Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

RALPH COYLE, WARDEN,
Petitioner,

v.

DAVID A. MAPES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether appellate counsel is constitutionally required to pursue all non-frivolous claims on direct appeal?

LIST OF PARTIES

Petitioner was the Warden of the Mansfield Correctional Institution at the time of the filing of petitioner's appeal in the court of appeals.

Respondent in this action is David Mapes, who is currently in custody at the Mansfield Correctional Institution.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Ralph Coyle, Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A-2, is reported at 171 F.3d 408 (6th Cir. 1999). The opinion of the district court, Pet. App. A-47, is unreported. The report and recommendation of the magistrate judge, Pet. App. A-49, is unreported. The opinion of the Ohio Supreme Court, Pet. App. A-123, is reported at 19 Ohio St. 3d 108 (1985). The opinion of the state court of appeals, Pet. App. A-148, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1999. A petition for rehearing was denied on April 30, 1999. Pet. App. A-1. This petition for a writ of certiorari has been filed within 90 days of that decision, as provided in Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

1. The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense."

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

This petition presents a question, which this Court may use to clarify an issue for the Nation. The question is whether effective counsel need raise all non-frivolous claims on a direct appeal. In this case, the court of appeals employed a multi-factored test, derived from several court of appeals decisions, to conclude that Respondent might not have received the effective assistance of appellate counsel even though appellate counsel winnowed out weaker arguments to pursue what reasonably appeared to be his twelve (12) strongest claims. Pet. App. A-39.

STATEMENT OF THE CASE

Respondent David A. Mapes was found guilty of aggravated murder and aggravated robbery in an Ohio trial court in 1983. In the course of a robbery, Respondent shot and killed a bar owner. A person previously solicited to assist in the crime by Respondent stepped forward and identified Respondent as a suspect. Based upon this information, a photo array was shown to a survivor who selected Respondent as resembling the gunman and thereafter positively identified him as the gunman.

Respondent admitted that he had participated in the robbery, but claimed that he was not the gunman. However, Respondent's accomplice testified that Respondent was the shooter, as did another survivor. Respondent's wife and a neighbor testified that Respondent owned a sawed-off shotgun like the one used during the robbery, and police found shells, of the same type used to kill Allen, in a drainpipe hole at Respondent's apartment.

The trial judge determined that Respondent was guilty of the aggravating specification of the two counts of

aggravated murder for violation of Ohio Revised Code Section 2929.04(A)(5) which provides:

> Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

The trial court then sentenced Respondent to death.

Respondent took a direct appeal to the Ohio Supreme Court and raised twelve assignments of error with four sub-parts. The Ohio Supreme Court affirmed Respondent's conviction.

Respondent filed his habeas petition in 1991, prior to the effected date of the Antiterrorism and Effective Death Penalty Act. Among other things, he alleged claims of ineffective assistance of appellate counsel.

In his report, Pet. App. A-49, the magistrate judge determined that Respondent's appellate counsel failed to raise one meritorious claim on direct appeal. The district court adopted the magistrate judge's recommendation that the trial court's supplemental jury instruction precluded the jury from considering the mitigating evidence surrounding a prior conviction.

Thereafter, the court of appeals discovered four new instances of ineffective representation, Pet. App. A-37, as follows:

> (1) trial counsel apparently did no mitigation, and presented no mitigation defense save an unsworn and uncorroborated statement by Mapes that he was not the New Jersey triggerman, even though corroborating evidence almost certainly existed; (2) over trial counsel's objection, the trial judge erroneously prohibited the sentencing jury from considering Mapes' only mitigating evidence, effectively requiring the jury to recommend death; (3) the trial judge erroneously required the jury to reject the death penalty unanimously before considering a life sentence; and (4) over trial counsel's objection, the court accepted a death recommendation from the jury despite one juror's obvious hesitation.

The court of appeals then affirmed the district court's issuance of the writ of habeas corpus inventing an eleven factor, multi-circuit list to determine whether appellate counsel performed with reasonable competence. In so ruling, the court of appeals found that all factors weighed in favor of granting the writ. The court of appeals also considered the underlying merits of the claims in its analysis. The court of appeals ordered the district court to conduct an evidentiary hearing to evaluate appellate counsel's performance in light of its multi-faceted test.

REASONS FOR GRANTING THE WRIT

An appellate counsel is not constitutionally required to pursue all non-frivolous claims on direct appeal. A court of appeals should not second guess the reasonable strategy of appellate counsel to winnow out weaker claims in

pursuit of what reasonably appears to be the most substantive appellate issues.

On direct appeal in the Ohio courts, Respondent's appellate counsel winnowed out a multitude of possible arguments to assert what reasonably appeared to be Respondent's twelve most substantive claims. The District Court held appellate counsel to be ineffective for failing to raise an additional non-frivolous claim. The majority of the Court of Appeals then expanded the District Court's opinion by identifying four additional non-frivolous claims which were not pursued on direct appeal, and remanded the case for an evidentiary hearing on appellate counsel ineffectiveness. Pet. App. A-35. In a concurring and dissenting opinion, Judge Siler concluded that each of the four new issues identified by majority opinion lacked merit. Pet. App. A-42.

It is not the constitutional function of a court of appeals to second guess an appellate counsel's strategic decision to winnow out arguably substantive claims in favor of what reasonably appears to be the strongest available appellate arguments. Here, the court of appeals post-hoc analysis of appellate counsel strategy conflicts with the command of this Court's decisions in *Jones v. Barnes*, 463 U.S. 745 (1983) and *Murray v. Carrier*, 477 U.S. 478 (1986). The court of appeals further disregarded the dictates of *Strickland v. Washington*, 466 U.S. 668 (1984), in favor of a new ad hoc eleven point ineffective assistance of counsel test gleaned from various circuit decisions. The lack of merit in the additional four identified appellate claims further highlights the flaw in the court of appeals' decision.

This Court has not squarely addressed the applicable test for determining ineffective assistance of appellate counsel with respect to claims that appellate counsel chose not to pursue in favor of other substantive claims. This Court

should answer this question, by clarifying and extending the standards articulated in *Jones v. Barnes*, 463 U.S. 745 (1983) and *Strickland v. Washington*, 466 U.S. 668 (1984).

This Court held in *Jones v. Barnes*, 463 U.S. 745, 752-753 (1983) that appellate counsel must recognize, "the importance of winnowing out weaker arguments on appeal" and focus on key issues in order to avoid the danger of "burying good arguments...in a verbal mound made up of strong and weak contentions." *Id.* (citations and portions omitted). Here, appellate counsel heeded this standard by raising important, key issues on direct appeal. As noted by the court of appeals, "Appellate counsel brought twelve assignments of error, indicating that winnowing of issues was not a primary consideration." Pet. App. A-39.

Both *Jones* and *Strickland* suggest that appellate counsel are constitutionally effective when substantive issues are raised on appeal. In this case, even the court below agreed that appellate counsel chose twelve substantive claims to pursue on appeal. However, employing a unique eleven-part test, which mixed subjective elements and unprecedented prongs to evaluate appellate counsel effectiveness, in direct conflict with this Court's *Strickland* analysis, the court of appeals nevertheless found possible ineffectiveness in counsel's failure to include four additional claims. Pet. App. A-37.

The court of appeals analysis allowed the court to "short-circuit" the doctrine of procedural default in favor of *de novo* merits review **of underlying claims which were never presented to the state courts**. For example, with the benefit of hindsight, the court of appeals deemed an omitted jury instruction claim meritorious, despite the fact that the claim was not supported by Ohio law at the time of appellate counsel's briefing. Pet. App. A-37. Concurring Judge Siler

noted the absurdity of this point, "It is not ineffective assistance of counsel when counsel fails to anticipate a change in the law." Pet. App. A-45. *Cf. Lockhart v. Fretwell*, 506 U.S. 364 (1993).

Contrary to this Court's *Strickland* dictates, in its opinion the court of appeals conducted a subjective analysis of appellate counsel's strategy. *Strickland*, however, requires a habeas court to determine if an attorney's performance is *objectively* reasonable - the inquiry does not hinge on an individual attorney's ability, and subjective knowledge.

Moreover, the analysis of the new claims proposed by the court of appeals majority decision, as correctly noted by Judge Siler, Pet. App. A-44, is simply wrong. After demonstrating the lack of merit in the four new claims propounded by the appellate court, Judge Siler cogently observed, "Appellate counsel did a commendable job on direct appeal in this case. He raised twelve issues. Although, in hindsight we now criticize the brief for not raising other issues, the only question which arguably should have been raised is that pertaining to the consideration of mitigation evidence surrounding the homicide in New Jersey." Pet. App. A-45-6.

Furthermore, the one substantive claim embraced by both the district court and court of appeals which was not raised by appellate counsel, is based on a misreading of the record. Indeed, the underlying action for which appellate counsel was found to be ineffective concerns a trial court response to a jury question, which was entirely proper. Contrary to the lower court decisions, the trial court did **not** exclude Respondent's New Jersey conviction from its clear and unambiguous charge to the jury of their right to consider any mitigating circumstances:

Now, we use the term "aggravating circumstances." What is aggravating circumstance? In this particular case, the aggravating circumstance is precisely set out in the specifications contained in Count 1 and Count 2 known as the Fourth Specification in each count of aggravated murder, to-wit: Specifications 4 of Count 1 and 2.

That the defendant, David Mapes, was convicted in Passaic County Court, New Jersey, Case No. 908-72 of murder on June 30, 1972, of which an essential element was the purposeful killing of another.

I have used the words, and the attorneys have used the words "mitigating factors."

Mitigating factors are factors that, while they do not justify or excuse the crime, nevertheless in fairness and mercy, may be considered by you as extenuating or reducing the degree of the defendant's blame or punishment.

These mitigating factors include, but are not limited to, the nature and circumstances of the offense, the history, character and background of the offender, and any and all mitigating factors, including those mitigating factors, those statutory mitigating factors, but not limited thereto.

(Tr. 4178-79).

The jury instruction necessarily informed the jury of their right to consider mitigating circumstances from Respondent's New Jersey conviction. The instruction further correctly informed the jury that mitigating circumstances from the New Jersey conviction could not be used to negate the finding that Respondent had been convicted of an offense that had the essential element of which was the purposeful killing or attempted killing of another. Similarly, the "improper" question and response, to which no objection was made by Respondent's trial counsel, reads as follows:

> THE COURT: Ladies and gentlemen of the jury, I am in receipt of a number of questions purported to me by the jury. And I have interrupted your deliberations to return you here to the courtroom because of these questions for further instructions.
>
> * *
>
> Now, as to the first question, which reads as follows:
>
> "Are we just to consider evidence presented to us in the sentencing hearing or testimony and evidence from both the trial and sentencing hearing as regarding the mitigating factors?"
>
> Of course, this is the fourth time I have explained this orally to you. If you find from all the evidence at the sentencing hearing and at the trial that the defendant has gone forward with some evidence of mitigation, and you find that the evidence exists as to the mitigation, then you are to consider it.
>
> The next question read:

"Does the seven mitigating factors as it applies to Spec 4 cover this case and the prior conviction?"

I have at least three times explained this to you. You are required to accept without reservation the fact that the defendant was convicted in 1972 of murder. And an essential element of which was the purposeful killing of another.

The mitigating factors do not apply to the prior murder conviction at all. I might say that this is the aggravating circumstances that he was found guilty of when he waived the jury to me. And you are here to compare any mitigating circumstances that you find in this case with that aggravating circumstance.

Mr. Londell Smith, does that satisfy you?

THE FOREMAN: Yes

THE COURT: All right. Thank you. You may resume your deliberations.

(Tr. 4215-17).

The district court's condemnation of the above instruction was based upon the faulty premise that the trial court instructed the jury as a matter of law that they were precluded from considering the circumstances surrounding the prior conviction. This conclusion is based upon a strained interpretation of the trial court's words which seeks

to change the true issue of Respondent's aggravated circumstance.

The issue at trial with respect to Respondent's death penalty specification, and the issue in this appeal, is **not** whether Respondent was the triggerman in the 1972 New Jersey murder conviction. Rather, the issue is whether Respondent had been convicted of a offense that had an essential element of which was the purposeful killing of or attempt to kill another as defined by Ohio Revised Code Section 2929.04(A)(5). In this regard the trial court did no more than correctly instruct the jury that under Ohio law they could not use the mitigating circumstances from Respondent's New Jersey murder conviction to find that said conviction did not constitute an aggravated circumstance.

In stark contrast to *Sumner v. Shuman*, 483 U.S. 66 (1987), wherein this Court struck down a statute that mandated the death penalty for an inmate convicted of murder while serving a sentence of life without parole, the jury here was **not** barred from considering any mitigating circumstances from Respondent's New Jersey conviction. Rather, the jury simply could not consider the evidence of mitigation to erode the existence of an aggravating circumstance. This "limitation" was in accord with both state and constitutional law. Contrary to the holding of the lower courts, appellate counsel was not constitutionally required to append this claim to the twelve substantive claims which were raised on direct appeal.

More is certainly required than a mere hindsight evaluation of claims that an appellate attorney chose not to raise than the test articulated by the court of appeals. The test truncates this Court's *Strickland* analysis into a scenario in which, irrespective of the substantive claims pursued on

direct appeal, appellate counsel should have included an additional defaulted claim on direct appeal.

This petition therefore presents this Court with an opportunity to articulate the standard for evaluating the winnowing process of appellate counsel in capital cases, particularly with respect to whether all non-frivolous claims need be raised on direct appeal. Although *Strickland*, *Jones* and *Murray* do not adequately answer this question, the test employed by the court of appeals is contrary to the dictates of each of said cases.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests this Court to grant the writ of certiorari.

Respectfully submitted,

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July 29, 1999

(2)

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DAVID A. MAPES

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME I

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APPENDIX A

Filed 4/30/99

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 96-4189/96-4196

DAVID A. MAPES,
Petitioner-Appellee/Cross-Appellant,

vs.

ARTHUR TATE, WARDEN
Respondent-Appellant/Cross-Appellee.

JUDGES: BEFORE: RYAN, SILER, and DAUGHTREY, Circuit Judges.

OPINION: ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

APPENDIX B

Filed: 3/24/99

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 96-4189, 96-4196

DAVID A. MAPES,
Petitioner-Appellee/Cross-Appellant,

vs.

RALPH COYLE, WARDEN
Respondent-Appellant/Cross-Appellee.

Argued Jan. 27, 1998.

Decided March 24, 1999.

Before: RYAN, SILER, and DAUGHTREY, Circuit Judges.

RYAN, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. SILER, J., delivered a separate opinion concurring in part and dissenting in part.

OPINION BY: RYAN, Circuit Judge.

Warden Ralph Coyle appeals from the recommendation by a federal magistrate judge, adopted by the district court, that a conditional writ of habeas corpus should issue barring Ohio from carrying out the death sentence imposed on petitioner David A. Mapes by an Ohio state court. Mapes cross- appeals the denial of his habeas petition concerning his judgment of conviction. We find that, with one possible but important

exception, Ohio courts did not deprive Mapes of any constitutionally guaranteed right. The exception is the significant likelihood that Mapes's appellate counsel was unconstitutionally ineffective. Thus, while we must affirm the district court's rejection of Mapes's challenge to his conviction, we will remand so that the district court can determine, in an evidentiary hearing, whether the performance of Mapes's appellate counsel fell below the constitutional minimum.

I. PROCEDURAL HISTORY

A.

On the morning of January 30, 1983, two or three armed men entered Chap's Bar in Cleveland, Ohio, and attempted to rob its employees. In the course of the robbery, one of the owners of the bar, John Allen, was shot and killed. Later, upon hearing news accounts of this crime, a Cleveland man contacted the police and indicated that David Mapes had earlier attempted to recruit him to help commit the robbery at Chap's. The police then showed Mapes's photo, in a photo array, to one of the survivors of the robbery. That person, John Hovekamp, selected three photos that resembled the gunman; one was of Mapes. Mapes was arrested and placed in a lineup. Hovekamp positively identified him as the Chap's gunman.

Mapes admitted that he had participated in the robbery, but claimed that he was not the gunman. However, Mapes's accomplice testified at trial that Mapes was the shooter, as did another survivor, Ronald Rucci. Mapes's wife and a neighbor testified at trial that Mapes owned a sawed-off shotgun like the one used at Chap's, and police found shells, of the same type used to kill Allen, in a drainpipe hole at Mapes's apartment. Not surprisingly, an Ohio jury convicted the petitioner of aggravated murder.

Mapes had been charged with a death penalty "specification" alleging that he had previously been convicted of an offense, an essential element of which was the purposeful killing of another. This specification was tried to the judge alone. Because Mapes had pleaded *non vult*, or "no contest," in 1972 to a charge of murder in New Jersey, the Ohio trial court found Mapes guilty of the specification. One of Mapes's habeas corpus assignments of error is that the trial court wrongly excluded evidence that Mapes was not the "triggerman" in the New Jersey killing. Mapes did not, however, contest the fact that he had previously been convicted of murder.

The trial court's finding regarding the prior conviction made Mapes preliminarily "eligible" for the death penalty and required that the jury hear evidence regarding seven statutory aggravating and mitigating factors and, based on its determination whether the aggravating factors outweighed the mitigating factors or vice versa, recommend to the court that Mapes should or should not be sentenced to death. The only evidence of mitigation Mapes submitted was his unsworn statement that he was only 18 years old at the time of the New Jersey murder, that the conviction was really for manslaughter in light of the sentence he received, and that he was not responsible for the actual shooting. In rebuttal, the prosecutor emphasized the fact that Mapes's statement was unsworn--thereby preventing cross-examination--and argued that the statement was irrelevant in any case. The court then instructed the jury that it must reach unanimity on whether to recommend the death penalty before it could consider a recommendation of a term of imprisonment. Ultimately, Mapes was sentenced to death.

B.

A new attorney was appointed to represent Mapes on his direct appeal to the Ohio Court of Appeals, and counsel

brought 12 assignments of error. Of the 12, 11 pertained to the guilt phase of trial. In the only sentencing argument, Mapes alleged that, by commenting on the fact that his mitigation statement was unsworn, the prosecutor had infringed on Mapes's Fifth Amendment right to remain silent. Appellate counsel did not raise several sentencing issues about which trial counsel had made contemporaneous objections. Mapes's judgment of conviction and his death sentence were affirmed by the Ohio Court of Appeals, *State v. Mapes*, No. 47191, 1984 WL 5285 (Ohio Ct.App. Oct. 25, 1984), and they were affirmed again upon appeal to the Ohio Supreme Court, *State v. Mapes*, 19 Ohio St.3d 108, 484 N.E.2d 140 (Ohio 1985).

C.

Mapes then obtained a third attorney, and petitioned the trial court for post- conviction relief. That counsel argued that Mapes's trial and appellate lawyers had both rendered ineffective assistance, and that the trial court had committed seven reversible errors. The trial court declined to grant relief,, ruling that it had no authority to overrule the court of appeals' affirmance of Mapes's conviction and sentence. The court of appeals affirmed the trial court's decision, holding that the trial judge had correctly refused to pass on Mapes's assignments of error. *State v. Mapes*, No. 56608, 1990 WL 20864 (Ohio Ct.App. Mar. 8, 1990). Finally, the Ohio Supreme Court dismissed Mapes's appeal from the denial of post-conviction relief, ruling that "no substantial constitutional question" existed. *State v. Mapes*, 53 Ohio St.3d 703, 558 N.E.2d 57 (1990).

D.

On January 10, 1991, Mapes filed his habeas corpus petition in the federal court. He brought 15 assignments of constitutional error. The petition was referred to a magistrate

judge who declined to address the constitutional merits of many of these, for the reason that seven of the assignments of error presented in Mapes's habeas petition were not presented on his direct appeal, and thus were deemed precluded by Ohio courts on post-conviction appeal. That is, an adequate and independent state-law ground existed for denying relief even if Mapes's trial was constitutionally flawed.

Of the remaining eight assignments of error, the magistrate judge recommended that all but one be dismissed. The only claim credited by the magistrate judge was that Mapes had received ineffective assistance of appellate counsel by virtue of counsel's failure to argue on direct appeal that the trial court had impermissibly precluded the jury from considering mitigating factors relating to the prior guilty plea Mapes had entered in New Jersey. Thus, the magistrate judge recommended a grant of Mapes's petition unless Ohio courts granted another review within 90 days. The district court agreed, and this timely appeal followed.

II. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996, or AEDPA, was signed into law on April 24, 1996. Pub.L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §2254 (1996)). However, it does not apply to habeas petitions pending on that date. See *Lindh v. Murphy*, 521 U.S. 320, 321-23, 117 S.Ct. 2059, 2061, 138 L.Ed.2d 481 (1997); *Rickman v. Bell*, 131 F.3d 1150, 1154 (6th Cir.1997), *cert. denied*, --- U.S. ----, 118 S.Ct. 1827, 140 L.Ed.2d 962 (1998). Because Mapes's habeas petition was filed in 1991, the pre-AEDPA standard of review applies, which we recently summarized in *Rickman*. That is, primary, or historical, facts found by state courts are presumed correct and are rebuttable only by clear and convincing evidence. Determinations of law, or determinations involving mixed questions of fact and law, however, receive de novo review. *Rickman*, 131 F.3d at 1153.

III. ANALYSIS

A. Substantive Trial Error

Mapes argues in his habeas appeal that the trial court committed a number of reversible errors. He contends that the trial court misinstructed the jury on several matters; that the jury was allowed to return inconsistent verdicts at the guilt phase; that the jury was allowed to return a non- unanimous verdict at the sentencing phase; that the trial court was biased against Mapes and committed judicial misconduct; and that the court wrongly excluded relevant evidence at the bench trial on the prior-murder-conviction specification. Of course, we are concerned only with errors of constitutional dimension; moreover, even constitutional errors will not be noticed if an adequate and independent state-law ground exists for upholding the conviction or sentence. *See Wainwright v. Sykes*, 433 U.S. 72, 86-87, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Upon a careful review of the record and the parties' briefs, we conclude that Mapes is foreclosed from bringing most, but not all, of the alleged assignments of error because he failed to raise them in Ohio courts--and this failure is an adequate and independent ground for affirmance.

Since the central issue before us is whether, as the federal district court found, Mapes's appellate counsel was constitutionally ineffective for failing to raise several alleged trial errors, we must first determine whether the trial court in fact erred. If it did not, there can be no constitutional deficiency in appellate counsel's failure to raise meritless issues. If the trial court did err, the questions then become whether appellate counsel was constitutionally ineffective for failing to raise those errors on appeal and, if so, whether the petitioner was prejudiced by counsel's unsatisfactory representation. We shall address those questions in due course, but we must, of course, first examine Mapes's

allegations of error, even though, on their own merits, they may be defaulted.

1. Jury Instructions

Mapes contends that the trial court instructed the jury erroneously in the following ways:

The trial judge repeatedly told the jury that its job was merely to recommend a sentence. The intent and actual effect of this misleading instruction was to diminish the jurors' sense of responsibility and increase the likelihood of a death verdict. This was error because a "recommendation" not to impose the death penalty would be binding on the court, and because Ohio trial courts almost never reject a death recommendation.

The trial judge specifically instructed the jury that a gun specification was a death specification. It is not. Under Ohio law, it is irrelevant whether the erroneous instruction misled the jury, because precedent requires reversal if such error occurs.

The jury was instructed that it had no discretion in making its sentencing recommendation if aggravation was found to outweigh mitigation. Even if the jury found the aggravating circumstance of the prior killing to outweigh any mitigating factors, it should have been able to exercise merciful discretion and recommend against the death penalty.

The jury was given "acquittal-first" penalty-phase instructions. That is, the jury was instructed that it had to reach unanimity on whether Mapes should be sentenced to death before it could consider any lesser sentence. Such instructions impermissibly interfere with jury deliberations by requiring that an affirmative step be taken before deliberation may move from one level to the next, and give a negotiating edge to jurors in favor of recommending the death penalty.

The court erred by giving a supplemental instruction which prohibited the jury from considering mitigating factors related to the New Jersey conviction.

We discuss each of these contentions in turn.

a.

Pertinent to the first claim--the "recommendation" issue--the Supreme Court has recognized that there is a danger in leading a death-sentence jury to believe that the ultimate responsibility for a death sentence lies with appellate courts. *See Caldwell v. Mississippi*, 472 U.S. 320, 332-33, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). In *Caldwell*, the prosecutor told a death-jury that a death sentence would really be determined by the state supreme court. *Id.* at 323, 105 S.Ct. 2633. This violated the defendant's rights under the Eighth Amendment to be protected from cruel and unusual punishment primarily because it allowed the jury to believe that it could make an incorrect determination without harming the defendant, and because appellate courts are ill-equipped to accurately review such aggravation-mitigation determinations. *Id.* at 330-32, 105 S.Ct. 2633.

However, in order to make out a *Caldwell* violation, a defendant must show that the prosecutor or trial judge improperly described the jury's role under state law in order to "water down" its responsibility. *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1101 (6th Cir.1990). In *Kordenbrock*, the prosecutor told the jury that a death-sentence verdict would merely be a recommendation to the trial judge. State law provided that

> "the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances

... exist and to recommend a sentence for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law."

Id. (quoting Ky.Rev.Stat. Ann. §532.025(1)(b)). This court found no constitutional violation because the prosecutor's characterization was "technically ... correct[ ]." *Id.*

In this case, Ohio law provides:

> Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury ... shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to [one of various terms of imprisonment]....
>
> If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall [weigh

> independently the aggravating and mitigating factors, and impose the death penalty if the former outweigh the latter, and impose a life sentence otherwise.]

Ohio Rev.Code Ann. §2929.03(D)(2), Vol. I (emphasis added); see *id.* at (D)(3).

Thus, while it is somewhat inaccurate to state that a sentencing jury "recommends" a life sentence when such a recommendation would be binding, we conclude that even if the trial judge's instruction was erroneous it could not have diminished the jury's sense of responsibility in *Caldwell* terms. The only plausible way that Mapes's jury could have been lulled into a diminished sense of responsibility is if it erroneously believed that a death verdict would only be a recommendation. However, this is an accurate statement of Ohio law. Further, one of the primary dangers identified in *Caldwell*--that the entity to which the jury ceded responsibility could not adequately exercise that responsibility--is absent here. In *Caldwell*, the state courts of appeals could not accurately assess the aggravating and mitigating factors presented in a sentencing hearing. In this case, it was the trial judge presiding over the hearing who reviewed the jury's determination. There was no constitutional error.

b.

As for the second issue, Mapes does not point to any instance in which the penalty-phase jury was instructed that a gun specification it found proved at the guilt phase had any bearing on the death-penalty recommendation. Moreover, the trial court did instruct the sentencing jury that the gun specification was irrelevant, and repeatedly stated that the only aggravating factor to be considered was the prior New Jersey killing. There was no error.

c.

Third, an instruction to a death-sentence jury that it may disregard the statutory criteria for imposing a death sentence may be constitutionally impermissible in light of the probability that such an instruction would result in arbitrary and unpredictable results. *See California v. Brown*, 479 U.S. 538, 541, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987). According to the Court, "sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses." *Id.* Thus, an instruction that the jury should not be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" was not only unobjectionable in Brown, it "serve[d] the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on [irrelevant,] extraneous emotional factors." *Id.* at 542, 543, 107 S.Ct. 837. Thus, there is no merit whatsoever to Mapes's claimed entitlement to a "merciful discretion" instruction, in light of the likely tendency of such an instruction to lead to arbitrary differences in whom is selected to be sentenced to death.

d.

As for the fourth issue, the trial court instructed the jury as follows:

> Now, as I have indicated, if all twelve jurors find by proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, that is the aggravating circumstances which he was found guilty, Specification 4 in each count, then you must return a finding to the Court.
>
> I instruct you, as a matter of law, that if you make such finding then you have no choice and must

> recommend to the Court that the sentence of death be imposed on the defendant, David Mapes.
>
> . . . . .
>
> On the other hand, if after considering all of the relevant evidence raised at trial, the testimony, the other evidence, the unsworn statement of David Mapes, the evidence of the State of Ohio, and the arguments of counsel, you find that the State of Ohio failed to prove that the aggravating circumstances which the defendant, David Mapes, was found guilty of committing outweigh the mitigating factors, then you will return your verdict reflecting your decision. That is, you must unanimously find that the State has failed to prove beyond a reasonable doubt that the aggravating circumstances of which the defendant was found guilty of committing outweigh the mitigating factors. In this event you will then proceed to determine which of two possible imprisonment sentences to recommend to the Court.

(Emphasis added.) But the Ohio death-sentence statute contains no requirement that a capital jury must unanimously reject a death sentence before considering life imprisonment. See Ohio Rev.Code Ann. §2929.03(D)(2). A recommendation of death must be unanimous, but "[a]bsent such a [unanimous] finding, the jury shall recommend that the offender be sentenced to [some variety of life sentence.]" *Id.* Thus, under the statute, a jury that was not unanimous either way on a death sentence could consider a life sentence.

Moreover, the Ohio Supreme Court has ruled that an acquittal-first instruction, such as the one given by the trial court here, violates the Eighth and Fourteenth Amendments by creating a risk of an erroneous imposition of the death penalty.

See State v. Brooks, 75 Ohio St.3d 148, 661 N.E.2d 1030, 1041 (1996).

> The record reflects that the jury in this case was instructed in a manner completely contrary to law, making it less likely for Brooks to benefit from the opinion of one juror that the death penalty was inappropriate.... [I]f a juror believed his one vote could not affect the ultimate result, he might acquiesce in the death sentence. In this case, the jury instruction undermined the reliability of the jury verdict and risked erroneous imposition of the death sentence, thereby materially prejudicing Brooks's right to a fair trial.

661 N.E.2d at 1042. This error required vacating the death sentence and remanding for re-sentencing. *Id.* Although the trial court in this case did not have the benefit of *Brooks*, that case clearly establishes that the trial court misapplied Ohio Revised Code §2929.03(D)(2) by requiring the jury to unanimously reject the death penalty before considering a life sentence.

e.

The fifth alleged error occurred in response to a question from the deliberating sentencing jury. In answer to the jurors' question whether they were permitted to consider mitigating evidence with respect to Mapes's prior New Jersey murder conviction, the trial court stated, *inter alia*: "The mitigating factors do not apply to the prior murder conviction at all."

The United States Supreme Court has strongly suggested that all relevant mitigating factors must be considered by a death-sentence jury. For instance, in *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the trial court considered the youth of the offender in imposing the death sentence, but refused to consider the fact that the

defendant had been physically abused and that he was emotionally disturbed. *Id.* at 108-09, 102 S.Ct. 869. The Court held that the trial court violated the defendant's Eighth Amendment rights by refusing, as a matter of law, to evaluate all the evidence of mitigation. *Id.* at 113, 102 S.Ct. 869.

We find that the limitations placed by [the trial and appellate] courts upon the mitigating evidence they would consider violated the rule in *Lockett*. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Id. at 113-15, 102 S.Ct. 869 (some emphasis added) (footnote omitted).

Several times, the *Eddings* Court reiterated the relevant rule:

> "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

Id. at 110, 102 S.Ct. 869 (some emphasis added) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)). The *Eddings* Court also noted that the statute in *Gregg v. Georgia*, 428 U.S. 153, 197, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), was upheld because it directed the jury to

consider "any mitigating circumstances." *Id.* at 111, 102 S.Ct. 869. Stated differently, "the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender...." *Id.* at 112, 102 S.Ct. 869 (emphasis added) (internal quotation marks and citation omitted). Thus, the *Eddings* Court consistently indicated that any and all mitigating circumstances must be considered in reaching a death sentence. *Id.* at 111-15, 102 S.Ct. 869.

If, after *Eddings* and *Lockett*, there remained any question about the relevance of mitigating evidence pertaining to a prior crime it was resolved in *Sumner v. Shuman*, 483 U.S. 66, 81, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987). Nevada's death-penalty statute required the imposition of a death sentence whenever an inmate serving a life sentence killed someone in prison. The inmate in *Sumner* was not allowed to introduce any mitigating factors, and a death sentence was imposed. The Court found this unconstitutional because the sentencing authority must be permitted to consider any relevant mitigating evidence before imposing a death sentence. *Id.* at 76, 107 S.Ct. 2716. Most importantly, the Court explicitly stated that the circumstances regarding the crime for which the inmate was serving a life sentence were relevant. *Id.* at 80-81, 107 S.Ct. 2716.

> Even if the [life-sentence] offense was first-degree murder, whether the defendant was the primary force in that incident, or a nontriggerman like Shuman, may be relevant to both his criminal record and his character.

Id. at 81, 107 S.Ct. 2716.

In Mapes's case, after retiring to determine whether to recommend a death sentence, the jury submitted two questions to the judge. In open court, the judge responded:

Now, as to the first question, which reads as follows:

> "Are we [(the jury)] just to consider evidence presented to us in the sentencing hearing or testimony and evidence from both the trial and sentencing hearing as regarding the mitigating factors?"
>
> Of course, this is the fourth time I have explained this orally to you. If you find from all the evidence at the sentencing hearing and at the trial that the defendant has gone forward with some evidence of mitigation, and you find that the evidence exists as to the mitigation, then you are to consider it.
>
> The next question read:
>
> "Does [sic] the seven mitigating factors as it applies [sic] to [the prior- conviction death-penalty specification] cover this case and the prior conviction?"
>
> I have at least three times explained this to you. You are required to accept without reservation the fact that the defendant was convicted in 1972 of murder. And an essential element of which was the purposeful killing of another.
>
> The mitigating factors do not apply to the prior murder conviction at all. I might say that this is the aggravating circumstances that he was found guilty of when he waived the jury to me. And you are here to compare any mitigating circumstances that you find in this case with that aggravating circumstance.

(Emphasis added.) Defense counsel objected to this instruction.

After further deliberations, the jury again proffered two questions. The court responded, in relevant part:

> This means that the defendant, at this particular hearing has to produce evidence, some evidence of mitigating factors. If the defendant doesn't produce any evidence and the only evidence you have from the defendant is the statement of the defendant, and if you find mitigating factors, fine, and if you don't, you don't have any mitigating factors.

> In its third mid-deliberations communication to the court, the jury requested a copy of Mapes's unsworn statement, which was read a second time. The statement offered no mitigating factors except those that applied to the New Jersey murder. The jury then returned a recommendation of death.

We find that the Ohio trial court erred by effectively prohibiting the jury from considering any mitigating evidence concerning the prior murder conviction. Although the mitigating evidence relating to the New Jersey conviction was not as weighty as would have been evidence regarding Mapes's culpability for the Allen murder, Mapes's exculpatory evidence relating to his role in the New Jersey murder was nonetheless relevant to his overall moral culpability. Ohio's death-penalty statute clearly requires proof that the defendant committed at least one abhorrent act in addition to his conviction for aggravated murder. Although the U.S. Supreme Court has stated that all relevant mitigating factors must be considered, Mapes's jury was not allowed to consider the New Jersey mitigation evidence. The excerpt from the trial transcript we have quoted above demonstrates that the jury believed it could not consider the mitigating factors submitted by Mapes relevant to the New Jersey conviction, and finding no other mitigating factors in Mapes's statement,

believed it was required to recommend death, as defense counsel predicted when objecting to the court's charge.

But all that being so, the trial court's instructional errors do not require granting Mapes's habeas petition because neither of these last two instructional issues was raised on appeal. Thus, Mapes's procedural default is an adequate and independent ground for affirming his sentence. Only in the context of deciding whether Mapes's appellate counsel was unconstitutionally ineffective in failing, nevertheless, to raise these matters on direct appeal are these underlying errors relevant.

2. Guilty Verdict

The petitioner contends throughout his briefs on appeal that the jury's verdict of aggravated murder is logically inconsistent with its not-guilty verdicts on two death "specifications." That is, the jury convicted Mapes of aggravated murder, one element of which is the specific intent to kill, but acquitted him of two death-penalty specifications, one alleging that the murder took place during an aggravated robbery, and the other that the death occurred during an aggravated burglary. Under Ohio law "aggravated" burglary is defined as:

> (A) No person, by force, stealth, or deception, shall trespass in an occupied structure, ... with purpose to commit therein any theft offense, ... or any felony, when any of the following apply:
>
> . . . . .
>
> (2) The offender has a deadly weapon ... on or about his person or under his control[.]

Ohio Rev.Code Ann. §2911.11. Aggravated robbery is a robbery, that is, committing a theft offense, if the person has "a deadly weapon ... on or about his person or under his control."

Mapes further maintains that being acquitted on a principal-offender specification means that the jury found he was not the "triggerman" in the Chap's shooting, and that being acquitted of the other specification means he did not have the specific intent to kill. Mapes further maintains that the verdicts are findings of constitutional fact, and thus the state courts' recitation of the facts, implying or stating that Mapes was the triggerman and did have the specific intent to kill Allen, is erroneous.

In other words, if Mapes neither shot Allen nor was complicit in a plan to shoot him, then he lacked, as a matter of constitutional law, the requisite culpability necessary under the Eighth Amendment to justify the death penalty. Additionally, Mapes would have lacked the requisite intent under the Ohio aggravated-murder statute which unambiguously requires, in a felony-murder situation, that a defendant who participated in the felony also have intended to cause the death of another. Therefore, his argument continues, if the state-court judgment is allowed to stand, he will have been convicted of aggravated murder although the jury found one of the essential elements lacking. According to Mapes, this violates his right to due process: his procedural right to know in advance the elements of a crime he is charged with, and his substantive right to fundamental fairness.

United States v. Powell, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984), requires us to reject Mapes's contentions. In *Powell*, the defendant's phone had been legally tapped, and she was recorded helping her son and husband distribute narcotics and collect money for drugs sold. When she was arrested, she had two kilograms of cocaine and 2700

methaqualone tablets, among other things, in her car. *See id.* at 59, 105 S.Ct. 471. A jury convicted her of using the telephone in conspiring to possess with intent to distribute cocaine. However, the same jury acquitted her of conspiring to possess with intent to distribute cocaine. *See id.* at 59-60, 105 S.Ct. 471. The defendant appealed from the convictions, claiming that the acquitted count constituted an element of the telephone-facilitation count of which she was convicted, and that therefore the verdicts were inconsistent. The Ninth Circuit agreed, finding that the acquittal on the predicate felony demonstrated that insufficient evidence existed as to the telephone- facilitation charge. *Id.* at 61, 105 S.Ct. 471.

The Supreme Court rejected this analysis,-reasoning that " '[t]he most that can be said [about an inconsistent verdict] is that the verdict shows that either in the acquittal or the conviction the jury did not speak their [sic] real conclusions, but that does not show that they were not convinced of the defendant's guilt.' " *Id.* at 64-65, 105 S.Ct. 471 (citation omitted). Significantly, the Court repudiated the argument that the portion of an inconsistent verdict favorable to the defendant must be accepted and the portion favorable to the government discarded. See *id.* at 65, 105 S.Ct. 471. To the contrary, it is possible "that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." *Id.* Although " 'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred," nothing in the Constitution requires that this "error" subject the jury's collective judgment to review and reversal. *Id.* at 65-66, 105 S.Ct. 471.

> [O]nce the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment. Courts have always resisted inquiring into a jury's thought processes ...;

> through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.

Id. at 67, 105 S.Ct. 471 (citations omitted).

Even if Mapes's convictions on the aggravated-murder charges and the acquittals on the specifications are truly inconsistent--a conclusion that does not necessarily follow--this does not mean that Mapes lacked the specific intent to kill Allen. All the verdicts demonstrate is that the jury found Mapes guilty of aggravated murder, including the element that he possessed the intent to kill, and that it found him not guilty of two specifications which would have supported the death penalty under Ohio law. The aggravated-murder conviction does not require guilty verdicts on the specifications, and therefore cannot be set aside. Similarly, the state could not have sought the death penalty under Ohio law based only on the finding implicit in the aggravated-murder conviction that Mapes intended to kill Allen. *Powell* teaches that the inconsistent verdicts are viewed completely separately, and that no conclusion may be drawn from comparing the two. Ohio is within constitutional limits in finding Mapes guilty of aggravated murder and in imposing the death penalty because the jury found he had the requisite intent on the substantive charge.

3. Judicial Bias and Misconduct

In the course of his state-court appeal from the denial of post- conviction relief, Mapes claimed for the first time that the trial judge was biased, and that the facts to establish such bias existed outside the record and were not available upon direct appeal. Primarily, Mapes relied on affidavits provided by a juror, June Chatman, and her husband. When contacted by Mapes's present counsel in 1991--recall that the trial occurred in 1983-- juror Chatman and her husband attested

that the trial judge called Mr. Chatman on the telephone during the trial, saying that he didn't understand why Mrs. Chatman "wouldn't go along with the group and why was she holding out on convicting Mr. Mapes" given that "everybody else was agreeing." Further, the affidavits allege that during the trial, the court attempted to intimidate Mrs. Chatman by refusing her requests to seek medical treatment. Mrs. Chatman maintains that she was pressured by the court into voting for both the conviction and the death sentence.

The original trial judge initially reviewed this post-conviction allegation, and denied Mapes an evidentiary hearing, ruling that the allegation was barred by res judicata because it could have been raised on direct appeal. On the next level of post-conviction appeal, the court of appeals also denied Mapes an evidentiary hearing, even though he had alleged that the trial judge had contacted a juror and that the evidence substantiating this claim was necessarily outside the trial record. The court of appeals stated, correctly we think, that Mapes "ha[d] not provided this court with any facts that would suggest bias." In fact, in our own review of the 28 exhibits covering 280 pages to which Mapes points as evidence of the trial court's improper conduct, we find nothing--other than the Chatman affidavits--to indicate that the trial judge did anything improper or was in any way biased.

As for the Chatman issue, Mapes contends that there was no proper means by which the trial judge could have obtained the information regarding Mrs. Chatman's hold-out status, and that perforce the judge's actions show his bias and misconduct. Assuming the Chatman affidavits are truthful, we agree with this assessment. Nevertheless, we find that Mapes's procedural default in failing to raise this issue on direct appeal is an adequate and independent ground for dismissing this assignment of error.

Review of a habeas petitioner's constitutional claims may be barred if the denial of those claims by the state court is supported by an adequate and independent state ground. See *Wainwright*, 433 U.S. at 86-87, 97 S.Ct. 2497. However, the fact that a petitioner has not complied with a state procedural rule cannot bar federal review of constitutional claims if the state rule is not " 'firmly established and regularly followed.' " *Jones v. Toombs*, 125 F.3d 945, 946-47 (6th Cir.) (citation omitted), *cert. denied*, 521 U.S. 1108, 117 S.Ct. 2490, 138 L.Ed.2d 997 (1997).

The cases that Mapes claims demonstrate Ohio's wavering commitment to its procedural default rules do not in fact do so. Although he is correct that, in some cases, Ohio courts have forgiven some procedural defaults and considered the merits, in most of these cases the procedural default is the failure to contemporaneously object at trial. None of the cases cited by Mapes involves a post-conviction appeal in which an Ohio court overlooks the doctrine established by *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104, syllabus (Ohio 1967). In *Perry*, the Ohio Supreme Court held that all assignments of error that were or could have been raised on direct appeal may not be considered collaterally in a post-conviction proceeding. *See id.* The only exception to that rule occurs when ineffective assistance of counsel is alleged and the petitioner had the same counsel during trial and on direct appeal. Even in its broadest form, this exception encompasses only those claims for which evidence is not contained in the trial record. See *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169, 171 (1982).

Even if we assume that Ohio would extend this exception to allegations of trial court bias or misconduct, evidence of which is outside the record, Mapes forfeited his right to pursue this avenue by failing to adduce any such evidence in his initial post-conviction proceeding. He made the allegation at least as early as 1989 that Mrs. Chatman had been pressured,

but provided no support for it until 1991. Thus, he had knowledge of the essential facts, but failed to obtain the necessary affidavits to prove them in Ohio proceedings. And he has failed to demonstrate that anything prevented him from obtaining these affidavits before 1991--that is, in time to present them to Ohio courts on direct or post-conviction review. For the same reasons, Mapes is not entitled to an evidentiary hearing in federal court on this issue.

4. Unanimity of Sentencing Jury

Mapes also claims that the jury that sentenced him to death was not unanimous as required by Ohio law. He argues that when the trial judge polled the jurors, juror Chatman equivocated as to whether the guilty verdict was her verdict, and hinted at coercion. Before setting forth verbatim the trial court's exchange with juror Chatman, we shall examine Ohio case precedent on the subject.

When a juror indicates reservations about a verdict, or there is a potential lack of unanimity, Ohio law appears to require further inquiry on the part of the trial judge. In *State v. Brown*, 110 Ohio App. 57, 168 N.E.2d 419 (Ohio Ct. App. 1953), for instance, a juror responded, when polled: "May I tell the truth? ... I went with the rest because I was the only one left." *Id.* at 420. Shortly thereafter, the following occurred:

> [Defense Counsel]: Your Honor, I move to permit her to tell what happened.
>
> The Court: No. No, not entitled to tell what happened. No. She hasn't any right to tell what happened.
>
> [Defense Counsel]: If it isn't her verdict, do you want her to so state?

The Court: I want her to state.

[The juror]: Yes, but I have told you--

The Court: All right. It is. It either is or isn't.

. . . . .

[Defense Counsel]: Just a moment, Your Honor, I move that said juror number two be permitted to state to you just what she was going to state, that is, that she voted "yes" for guilt, but it is not her verdict. That is what she wants to tell. I think she should be permitted to let the record show that. This is a serious--

The Court: I do not expect to ask the juror that. I do not think I have any right to.

[Defense Counsel]: Will you let her tell?

The Court: No.

. . . . .

The court will accept your verdict. The jury is discharged.

Id. at 420-21. After noting that, in Ohio, unanimity is required in a criminal trial, the Ohio Court of Appeals reversed the judgment of conviction because there was no unequivocal assent by the juror to the verdict. *Id.* at 422. Although the trial court was correct to prohibit the juror from trying to explain her verdict, the court had a duty to ensure that the verdict was truly unanimous. Because a juror may change his mind between the jury room and the court room, a trial court

must either interrogate a juror who equivocates about his answer, or direct the jury to retire for further deliberation.

In a later case, the Ohio Court of Appeals held that a juror's ambiguous statements did not require reversal of the conviction. See *State v. Fields*, 16 Ohio Op. 2d 290, 176 N.E.2d 845, 849-50 (Ohio Ct. App. 1960). Although the precise dialogue is not provided in the court's opinion, it appears that one juror cast some doubt about her verdict by saying that, while she agreed to have the foreman sign the verdict form, she was reluctant to give her consent. However, when the jury was polled a second time, she stated definitely that it was her verdict. She was given "full opportunity" to say whether it was or was not her verdict, and ultimately and unambiguously chose the former. Thus, no error occurred. *Id.*

In finding no error in the jury verdict in Mapes's case, the federal magistrate judge relied on *Emmert v. State*, 127 Ohio St. 235, 187 N.E. 862 (Ohio 1933). In that case, after ten of the jurors had claimed the guilty verdict as theirs, the final two jurors equivocated.

> By the Court (to Juror Miller): Q. Mrs. Miller, is this verdict which has been returned in open court your verdict? A. Well, I didn't want to sign it that way.
>
> Q. What is that? A. I didn't want to sign it that way.
>
> Q. Is it your verdict? A. I signed it; Yes, sir.
>
> Q. It is? A. I signed it.
>
> Q. What is that? A. I signed the verdict.
>
> Q. And it is your verdict? A. Well, I suppose if I signed it it would be.

> Q. I want to know if that is your verdict now. You ought to know if it is or not; is that your verdict? A. Well, I don't know. * * *
>
> Q. Is it not your verdict? A. In my heart I don't feel entirely satisfied with it.
>
> Q. You say that it is not your verdict? A. Well, I suppose you could call it that.
>
> Q. What is that? A. I suppose you could call it that.
>
> By the Court: Q. How about you Mrs. Leiter? A. Mine was because the majority rules is all.
>
> Q. I don't want to know the majority rule, I want to know whether that is your verdict? A. It is my signature and my verdict; yes. (Thereupon counsel confer with court at bench.)
>
> By the Court: Q. Mrs. Miller, we are a little confused as to your attitude. I should like to ask you this question in a larger form, but I am compelled to ask you in the language of the statute. Is or is not this verdict your verdict? A. Yes; it is.

187 N.E. at 863 (emphasis added). The state supreme court held that the trial court had not erred, noting that both jurors were given ample opportunity to disclaim the verdict, but instead had ultimately affirmed the guilty finding. *Id.*

In Mapes's case, the trial court asked each juror, "Is this your verdict?" Every juror responded affirmatively, except for June Chatman. The transcript of the jury poll reveals the following:

[THE COURT:] ... The question I am going to ask you is, is this your verdict, and if it is you say, yes.

. . . . .

THE COURT: June Chatman. June Chatman.

MRS. CHATMAN: This is the verdict?

THE COURT: The one that we just read.

MRS. CHATMAN: Yes.

Defense counsel then asked for a repoll, which the court granted. This time, when the other jurors again repeated their original responses, Mrs. Chatman hesitated:

THE COURT: June Chatman.

MRS. CHATMAN: I have to say yes or no?

THE COURT: Yes, you have to say yes or no. It is yes or no. Did you sign these?

MRS. CHATMAN: I signed them, yes.

[DEFENSE COUNSEL]: Objection, your Honor. Could we ask whether or not these were her verdicts?

THE COURT: Are these your verdicts, Mrs. Chatman?

MRS. CHATMAN: It's to me, it's the State's verdict.

THE COURT: Wait a second. Please be seated, [defense counsel]. Did you sign this verdict?

MRS. CHATMAN: Yes, I did.

THE COURT: Okay. Londell Smith, please.

[DEFENSE COUNSEL]: Objection, your Honor. It is not whether she signed it, is it her verdict?

THE COURT: Please be seated. It is sufficient for this Court. Londell Smith, please.

MR. SMITH: Yes.

Almost certainly, Mapes's trial court erred in accepting Mrs. Chatman's verdict. Although Mrs. Chatman seemed to assent to the verdict the first time she was polled, clearly she did not do so the second time. As the Ohio cases discussed above demonstrate, a juror may indicate her assent to a guilty verdict, but when the assent is conditional or hints at coercion, the trial judge is obligated to inquire further. Mrs. Chatman admitted to signing the verdict forms; however, this is insufficient under *Brown*. A juror may change her mind at any time before the verdict is entered, and that is what may have happened here. Mrs. Chatman's assent, if given at all, was not unequivocal. At the very least, the trial court was required to confirm with Mrs. Chatman that the guilty verdict was hers, or to send the jury back to deliberate further.

Emmert does not save the error, but rather seems to confirm it. In that case, the jurors equivocated, and the trial court properly inquired further. Although the preferred resolution probably would have been to send the jurors back to deliberate further, the court avoided the worst resolution, which was to enter the guilty verdict based on the verdict form alone. After questioning by the trial court, which the Ohio Supreme Court noted was not coercive, both *Emmert* jurors unambiguously assented to the verdict.

Here, Mrs. Chatman equivocated, she was not questioned further, and her verdict was accepted based on the fact that she had signed the form.

As with the other trial errors we have discussed above, however, this assignment of error has been forfeited unless appellate counsel was unconstitutionally ineffective in failing to raise it--a matter we shall address in due course.

5. Exclusion of Evidence Regarding Mapes's Prior Conviction

In this assignment of error, Mapes maintains that the trial court erred in ruling that it could not look behind the judgment of conviction on Mapes's New Jersey *non vult* murder plea, and that the error violated Mapes's right to due process and his right to be free from cruel and unusual punishment. According to Mapes, New Jersey law allows such judgments to be collaterally attacked when two criteria are met: (1) the plea was entered in order to avoid a possible death sentence, and (2) the record demonstrates a realistic possibility that the defendant did not commit murder. Mapes contends that his plea was entered to avoid the death penalty--even though New Jersey's death-penalty statute had been ruled unconstitutional by the New Jersey Supreme Court--because the U.S. Supreme Court had not yet ruled on a petition for certiorari, and could have reinstated a death sentence, had one been imposed.

Mapes further contends that several factors demonstrate he lacked the culpability to be convicted of the New Jersey murder. First, the New Jersey sentence was consistent with a conviction for manslaughter. Second, Mapes's explanation for his involvement in the New Jersey murder demonstrates at worst that he committed manslaughter. Third, Mapes has produced sufficient evidence of his contentions, including the New Jersey police report and the statements of others involved in the crime.

In Ohio, to be eligible for the death penalty a defendant must be found guilty of aggravated murder and at least one death specification. See Ohio Rev.Code Ann. §2929.04(A). Thus, a defendant who "[p]rior to the offense at bar ... was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another ...." may be sentenced to death if both judge and jury find that the death-specification circumstance outweighs any mitigating circumstance. §2929.04(A)(5).

Quite simply, it is irrelevant, for purposes of Ohio Revised Code Ann. §2929.04(A)(5), whether Mapes, in fact, killed someone in New Jersey. The specification does not apply to those who have previously killed others, but to those who have been convicted of a prior killing. There is no dispute that this condition was satisfied. The court properly excluded Mapes's proffered evidence on this issue because it is irrelevant.

B. Effectiveness of Trial Counsel

Mapes identifies four errors allegedly committed by his trial counsel: (1) failing to conduct any investigation into mitigation factors; (2) failing to object to the trial judge's misleading jury instructions and the trial judge's erroneous response to the sentencing jury's questions; (3) having no trial strategy other than being rude and abusive; and (4) failing to request a lesser-included-offense instruction.

In order to establish a Sixth Amendment violation, it must be shown both that counsel's representation fell below an objective standard of reasonableness, and his deficiencies prejudiced the defendant. *See Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In considering the second, "prejudice" prong of its test, the *Strickland* Court noted that even professionally unreasonable errors "do [ ] not warrant setting aside the judgment of a

criminal proceeding if the error[s] had no effect on the judgment." *Id.* at 691, 104 S.Ct. 2052. But *see United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Except in certain limited circumstances, "ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052. The Court explained, that to do so,

> it is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding....
>
> On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case....
>
> . . . . . .
>
> ... The appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 693-94, 104 S.Ct. 2052 (citations omitted).

The issues regarding counsel's performance during the guilt phase of Mapes's trial may be dismissed on the basis that the evidence of Mapes's guilt was overwhelming. That is, even assuming that trial counsel was not reasonably effective, Mapes can establish no prejudice. There is almost no chance that the verdict would have been different but for counsel's allegedly defective performance. Mapes admitted to taking part in the robbery, he was identified by eyewitnesses as the person who shot Allen, and corroborating evidence was admitted indicating he was the shooter. In light of this, there is no reasonable probability that different actions or a different strategy by counsel could have avoided a guilty verdict.

Mapes also fails to show any prejudice arising from counsel's alleged failure to obtain mitigation evidence besides that relating to the New Jersey killing. Mapes claims that counsel did no investigation in this regard, but the sworn statements he has produced as support for this contention merely show that certain persons were not contacted. Mapes does not indicate why these persons should have been contacted, or what mitigating evidence they would have supplied if they had been. He does not show that there was any mitigating evidence overlooked by trial counsel, let alone whether the discovery of such evidence would probably have inclined the jury to eschew a death-sentence recommendation.

On the other hand, the issue regarding the development of the New Jersey evidence is close. Under the Ohio statute, a capital defendant found guilty of a death specification has to present some mitigating evidence in order to avoid the death penalty. If a jury has nothing to weigh against the aggravating circumstance, it almost certainly must find that the aggravating circumstance outweighs the (nonexistent) mitigating circumstances, and recommend death.

The only evidence actually presented by trial counsel that could have saved Mapes from a death sentence was Mapes's

unsworn statement that he was not the triggerman in New Jersey. However, it appears that other evidence was available to corroborate Mapes's unsworn contention. That is, the record suggests that a man named Elliott Hampton was the triggerman in New Jersey. For instance, Hampton himself states that he is serving a life sentence after being convicted as the triggerman in that crime. And, another New Jersey accomplice states that Hampton, not Mapes, shot the New Jersey victim. Mapes's Ohio accomplice, Rodney Newton, has recanted his trial testimony that Mapes admitted being the New Jersey triggerman. Finally, although it is not in the record, the New Jersey police report purportedly concludes that Hampton, not Mapes, was the shooter. In his habeas petition, Mapes has provided the affidavits of three Ohio Public Defender Commission investigators who have sworn that they reviewed the police report and that it indicates Hampton was the triggerman.

Certainly, trial counsel must commit a serious error to be judged unconstitutionally ineffective. However, when a client faces the prospect of being put to death unless counsel obtains and presents something in mitigation, minimal standards require some investigation. The record indicates no such efforts by Mapes's counsel. And, even the little mitigation presented--Mapes's unsworn statement--could have been significantly corroborated by the evidence later gathered by Mapes's present counsel. There is no reason to believe this evidence was not available to trial counsel. Admittedly, whether Mapes was or was not the triggerman in the New Jersey killing is slim evidence of mitigation, but it is something. And what is most important, it was Mapes's only shield from a death sentence. Moreover, the New Jersey murder conviction was what made Mapes eligible for the death penalty in the first place. Therefore, the evidence that he was not the shooter was certainly relevant as to his overall culpability. One is left with the strong impression that trial counsel, after hearing the guilty verdict with the death

specifications, merely threw up his hands and conceded that his client would be put to death.

As we concluded above, the jury was wrongly precluded from even considering Mapes's unsworn statement concerning the New Jersey homicide as mitigating whether he deserved execution; it was erroneously required to reach unanimity on the death recommendation before considering a life sentence; and there is a good possibility that the sentencing jury was not, in fact, unanimous. Thus, when these errors are considered together with trial counsel's failure to investigate any mitigating factors, prejudice is almost self-evident.

To reiterate, however, this error too has been forfeited by Mapes's failure to raise it on appeal. It is relevant only insofar as it bears on the question whether appellate counsel was unconstitutionally ineffective in failing to raise it, an issue we turn to now.

C. Effectiveness of Appellate Counsel

Mapes contends that his appellate counsel was unconstitutionally ineffective because he failed to raise the following arguments on appeal: (1) trial counsel was ineffective; (2) the jury was erroneously instructed that its death sentence would only be a recommendation; (3) the jury was erroneously instructed that it had to unanimously reject a death sentence before it could consider a term of years; (4) the jury was not, in fact, unanimous on its death verdict; and (5) the sentencing jury was wrongly precluded from considering relevant mitigating evidence. Additionally, sixth, Mapes contends that his appellate attorney did not competently argue the constitutional issue regarding whether Mapes could be sentenced to death absent a finding that he intended to kill Allen.

We are satisfied that Mapes's counsel's failure to raise issues (2) and (6) above--(2) whether the jury's role was merely to "recommend" the death sentence, and (6) whether the jury found that Mapes intended to kill John Allen--was not unconstitutionally ineffective representation. As to the former, the jury's death sentence verdict was merely a recommendation. As to the latter, the jury did find that Mapes intended to kill Allen. The specific intent inherent in the aggravated-murder charge is supported by sufficient evidence, and the allegedly inconsistent verdicts on the specifications are irrelevant on this point. The finding of Mapes's specific intent to kill supports the murder conviction and brings the imposition of the death penalty within constitutional limits. Counsel could not be unconstitutionally ineffective for failing to raise these meritless arguments.

However, appellate counsel's failure to raise the trial errors surrounding the death sentence, most of which were objected to by trial counsel, is almost inexplicable. To summarize: (1) trial counsel apparently did no mitigation investigation, and presented no mitigation defense save an unsworn and uncorroborated statement by Mapes that he was not the New Jersey triggerman, even though corroborating evidence almost certainly existed; (2) over trial counsel's objection, the trial judge erroneously prohibited the sentencing jury from considering Mapes's only mitigating evidence, effectively requiring the jury to recommend death; (3) the trial judge erroneously required the jury to reject the death penalty unanimously before considering a life sentence; and (4) over trial counsel's objection, the court accepted a death recommendation from the jury despite one juror's obvious hesitation.

The cases decided by this court on the issue of ineffective assistance of appellate counsel suggest the following considerations that ought to be taken into account in

determining whether an attorney on direct appeal performed reasonably competently.

(1) Were the omitted issues "significant and obvious"?

(2) Was there arguably contrary authority on the omitted issues?

(3) Were the omitted issues clearly stronger than those presented?

(4) Were the omitted issues objected to at trial?

(5) Were the trial court's rulings subject to deference on appeal?

(6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?

(7) What was appellate counsel's level of experience and expertise?

(8) Did the petitioner and appellate counsel meet and go over possible issues?

(9) Is there evidence that counsel reviewed all the facts?

(10) Were the omitted issues dealt with in other assignments of error?

(11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

See Moawad v. Anderson, 143 F.3d 942, 948 (5th Cir.), *cert. denied*, 119 S.Ct. 383, 142 L.Ed.2d 316 (1998); *Bethea v. Artuz*, 126 F.3d 124, 126 (2d Cir.1997), *cert. denied*, 118 S.Ct. 1092, 140 L.Ed.2d 148 (1998); *Mason v. Hanks*, 97 F.3d 887, 893-94 (7th Cir.1996); *Sistrunk v. Vaughn*, 96 F.3d 666, 670-71 (3d Cir.1996); *Parker v. Bowersox*, 94 F.3d 458, 462 (8th Cir.1996), *cert. denied*, 520 U.S. 1171, 117 S.Ct. 1439, 137 L.Ed.2d 545 (1997); *McBride v. Sharpe*, 25 F.3d 962, 973 (11th Cir.1994); and *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir.1994).

Manifestly, this list is not exhaustive, and neither must it produce a correct "score"; we offer these inquiries merely as matters to be considered.

Applying them to Mapes's case, it appears that most of the factors fall in Mapes's favor. First, the issues omitted were significant and probably obvious. Although some of the cases cited were published after the appellate brief was submitted, nevertheless, by 1984: (1) Ohio's death-penalty statute did not require unanimous rejection of a death sentence before a jury could consider a life sentence, and in fact implied the opposite; (2) the Supreme Court had indicated that all relevant mitigating evidence, including evidence relating to a defendant's prior criminal record, must be considered by a sentencing jury; (3) *State v. Brown*, *State v. Fields*, and *Emmert v. State* all indicated that a trial judge must inquire further of an equivocating polled juror or send the jury back for further deliberations; and (4) the Sixth Amendment required that a defendant receive reasonably effective counsel at all stages of the proceedings. These errors should have been obvious in 1984; moreover, there appears to be no authority that would have tempered counsel's enthusiasm for bringing them, satisfying the second criterion.

Third, these issues were clearly stronger than some of those presented. Appellate counsel brought 12 assignments of

error, indicating that winnowing of issues was not a primary consideration. And all but one of these assignments pertained to the guilt phase, despite the overwhelming evidence of Mapes's guilt. In fact, the Ohio Court of Appeals expressly relied on the strength of the evidence in finding some errors harmless. Moreover, as the Ohio Court of Appeals' opinion demonstrates, several of the assignments were almost entirely meritless.

Fourth, the lack-of-unanimity and prohibition-of-mitigating-evidence issues were objected to at the sentencing phase. Concededly, it is unclear whether trial counsel objected to the court's erroneous instruction that the jury must unanimously reject the death penalty before considering a life sentence. But trial counsel's other objections should have prompted appellate counsel to investigate and raise those issues. Fifth, many of these omitted issues would have been subject to de novo review upon appeal. Thus, appellate counsel cannot have strategically reasoned that a court of appeals would defer to the trial court's rulings.

Sixth, appellate counsel has never been asked to defend his decisions, thus we can only guess what his reasons were for having failed to raise these issues. Similarly, we can only speculate whether he in fact read all the sentencing transcript. Seventh, the record does not reflect the level of appellate counsel's experience and expertise. Eighth, there is no evidence that Mapes and his appellate counsel met and discussed possible issues; nor is there evidence, ninth, that counsel knew all the relevant facts. Although we have not been provided Mapes's direct-appeal briefs, we note that the court of appeals did not mention in its opinion any of the facts pertinent to the omitted issues. This indicates that appellate counsel may not have discussed these facts either. Tenth, the omitted issues were not dealt with in other assignments of error.

Finally, eleventh, there seems to be no reasonable justification for omitting these issues. We find entirely plausible Mapes's contention that his appellate counsel did not read the entire sentencing transcript, as the attorney appears to have addressed every other conceivable nonsentencing argument in his brief. Interestingly, the Eleventh Circuit has held it unreasonable as a matter of law to fail to review a sentencing transcript where trial counsel made colorable objections. See *Joiner v. United States*, 103 F.3d 961, 963 (11th Cir.), *cert. denied*, 520 U.S. 1246, 117 S.Ct. 1857, 137 L.Ed.2d 1058 (1997).

Importantly, Mapes has not forfeited his right to a hearing on this issue, because he properly raised it on post-conviction review and Ohio courts erroneously refused to consider it. As we have noted, the trial court declined to conduct postconviction review because it believed it could not pass on the validity of the court of appeals' direct-review decision. If the trial court had found ineffective assistance of appellate counsel, it would have had to vacate the appellate judgment, a result which the court felt was beyond its authority. Inexplicably, the court of appeals rejected the ineffective assistance of appellate counsel argument because the trial court was correct in its opinion that it did not have the power to review the claim. It was thus that the erroneous circular reasoning was concluded. The Ohio Supreme Court did not discuss any of the merits upon post-conviction review. Consequently, Ohio's procedural ground for denying review of this claim is not "adequate" and cannot obviate the need for review of the constitutional merits. In light of the strong possibility that Mapes's Sixth Amendment rights in this regard were violated, he is entitled to have his ineffective-assistance-of-counsel argument heard in the federal district court.

Of course, even if counsel is found to have been ineffective, prejudice must still be shown. However, considering that all four errors concern the sentencing phase

and that juror Chatman almost certainly did not favor a death recommendation, we think there is a "reasonable probability that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *See Strickland*, 466 U.S. at 695, 104 S.Ct. 2052.

IV.

We conclude that Mapes may not have received, on direct appeal, the assistance of counsel which the Sixth Amendment guarantees. Thus, we REVERSE, IN PART, and REMAND this case for an evidentiary hearing so that the district court may evaluate appellate counsel's performance in light of the factors we have discussed. The district court's judgment denying the petitioner's claims in all other respects is hereby AFFIRMED.

SILER, Circuit Judge, concurring in part and dissenting in part.

I concur in the majority opinion on all issues except that pertaining to the effectiveness of appellate counsel. I also concur with the conclusion by the majority that Mapes has sufficiently raised the question of ineffective assistance of appellate counsel by the failure to raise on appeal the trial court's instruction that in the sentencing phase, "the mitigating factors do not apply to the prior murder conviction at all." That issue appears to have had validity at the time of the trial. *See Eddings v. Oklahoma*, 455 U.S. 104, 113-114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1981). Agreeing with the majority, I would remand that issue for an evidentiary hearing, so that appellate counsel, if he can recall, may explain why he failed to raise that issue on appeal. He may have had strategic reasons for omitting the issue, or his client may have requested that it be omitted. Because no court has yet heard testimony

from appellate counsel on that question, it is appropriate for the district court to decide whether appellate counsel's performance met the test under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

However, I depart from the decision by the majority to remand this matter to the district court for consideration of ineffective assistance of appellate counsel for failing to raise the other issues, to-wit, (1) ineffective assistance of trial counsel; (2) other jury instructions requiring the jury to reject the death penalty unanimously before considering a life sentence; and (3) the hesitation of Juror Chatman to reply in a more positive matter at the time of the jury poll.

The general principles of ineffective assistance of counsel bear repeating, to some degree. First, there is a strong presumption that counsel was constitutionally effective. *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. Second, counsel decides which issues to pursue on appeal and there is no duty to raise every possible claim. *See Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). The "process of 'winnowing out weaker arguments on appeal and focusing on' those most likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (quoting *Jones v. Barnes*, 463 U.S. at 751-52, 103 S.Ct. 3308). Finally, "[e]ffective advocacy does not require the appellate attorney to raise every non-frivolous issue under the sun, of course." *Mason v. Hanks*, 97 F.3d 887, 893 (7th Cir.1996) (citing *Jones v. Barnes*, 463 U.S 745, 103 S.Ct. 3308). These principles require that the court find that a particular omission of counsel both was not only ineffective but that the omission prejudiced the defendant, thus rendering the proceeding fundamentally unfair and the result unreliable. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. This is why the district court must hold a hearing, to give the petitioner an opportunity to call his

appellate counsel and allow him to explain the omission of the issue discussed herein. *See Sistrunk v. Vaughn*, 96 F.3d 666, 671 (3d Cir.1996).

On the other issues concerning the ineffective assistance of appellate counsel, I would uphold the decision of the district court. The majority has raised the issue of the ineffective assistance of counsel on appeal because he did not raise the question of ineffective trial counsel for their failure to conduct a mitigation investigation and present a mitigation defense other than Mapes's statement. I agree with the district court's conclusion that Mapes has not shown that trial counsel was ineffective at the sentencing phase, so appellate counsel could not have been ineffective in failing to raise this issue on direct appeal. The affidavits of an attorney and a mitigation specialist do not show what mitigating evidence could have been produced that was not. In addition, although Mapes has presented some evidence that he was not the trigger man in the New Jersey homicide, this evidence was not discovered until 1987, and there is no proof that defense counsel could have discovered it at trial. As to the references to the New Jersey police report, the petitioner has not even yet produced copies of it. Finally, the trial court instructed the jury, anyway, that it was not to consider any mitigating factors pertaining to the New Jersey murder. Therefore, if the trial court's instruction effectively precluded the jury from considering any mitigation in connection with the New Jersey homicide, then such evidence could not have been introduced.

Next, I dissent from the conclusion of the majority that appellate counsel was ineffective for failing to raise the issue that the trial court's instructions were erroneous by requiring the jury to reject the death penalty unanimously before considering a life sentence. I agree with the district court that the instruction by the court was in accordance with the language from R.C. §2929.03(D)(2). Obviously, according to the majority opinion, *State v. Brooks*, 75 Ohio St.3d 148, 661

N.E.2d 1030, 1041 (1996), later indicated that similar language was erroneous. However, *Brooks* was decided many years after the trial of this case, and it cited for authority *Mills v. Maryland*, 486 U.S. 367, 376-377, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). Thus, at the time of the trial here, there was no authority that such an instruction was erroneous under Ohio law. It was even said in *Brooks*, 661 N.E.2d at 1042: "In Ohio, a solitary juror may prevent a death penalty recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors. Jurors from this point forward should be so instructed." Thus, it appears that Brooks was stating that the law which affected that particular case was to be considered prospectively only. Mapes in this case cites *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), as authority that this instruction was erroneous, but Thomas, as analyzed by the district court, involved the guilt phase of a trial and involved a lesser-included offense, which is not the situation here. Thus, Thomas is not applicable to this case. It is not ineffective assistance of counsel when counsel fails to anticipate a change in the law. See *Sistrunk*, 96 F.3d at 671.

Finally, I also dissent from the conclusion of the majority that the district court should conduct a hearing on the failure of appellate counsel to inquire further into the poll of the jury. During the poll, Mrs. Chatman, the juror, said that she signed the verdict. In response to the court's question, "Are these your verdicts, Mrs. Chatman," she replied, "It's to me, it's the State's verdict." Although the court could have returned the jury to the jury room for further deliberation, receiving the verdict under the circumstance was not erroneous. I disagree with the majority that *State v. Fields*, 176 N.E.2d 845, 849-50 (Oh.Ct.App.1960); *State v. Brown*, 110 Ohio App. 57, 168 N.E.2d 419 (Oh.Ct.App.1953); and *Emmert v. State*, 127 Ohio St. 235, 187 N.E. 862 (1933), hold to the contrary. Although the issue is one which could have been raised on appeal, the failure to do so does not constitute ineffectiveness of counsel.

That issue was not a "dead-bang winner" as used by one of our sister circuits, in describing an issue that is obvious from the trial record (and one which would probably have resulted in a reversal on appeal). See *Banks v. Reynolds*, 54 F.3d 1508, 1515 n. 13 (10th Cir.1995). Appellate counsel did a commendable job on direct appeal in this case. He raised twelve issues. Although, in hindsight, we now criticize the brief for not raising other issues, the only question which arguably should have been raised is that pertaining to consideration of mitigation evidence surrounding the homicide in New Jersey. Even the failure to raise that issue may be excused after a hearing in the district court when appellate counsel has an opportunity to explain how he conducted the case. The difficulty in this case will be whether the attorney can even remember why he did certain things on appeal, for the direct appeal concluded in 1985. It would be very hard for any of us to explain our conduct which occurred some thirteen years ago.

APPENDIX C

Filed: 9/30/96

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID A. MAPES,	)	Case No. 1:91 CV 0056
	)	
Petitioner,	)	JUDGE SOLOMON OLIVER, JR.
	)	
ARTHUR TATE, WARDEN	)	
	)	
	)	
Respondent.	)	ORDER

This court has before it the February 24, 1994, Report and Recommendation of the Magistrate Judge regarding the habeas petition of David A. Mapes seeking relief from his conviction in the Cuyahoga County Common Pleas Court for aggravated murder and his resulting death sentence. The court has thoroughly reviewed the pertinent portions of the record, the Objections (Docket #57) and Supplemental Objections (Docket #59) of the Respondent, the Objections of the Petitioner (Docket #61), the Reply by Respondent to Petitioner's Objections (docket #66). This court has found that neither the Petitioner's Objections or those of the Respondent are well taken. The court hereby adopts the Report and Recommendation of the Magistrate Judge in its entirety.

The petition for a writ of habeas corpus concerning the conviction of Petitioner is denied. The petition for a writ of

habeas corpus regarding the death sentence is granted unless the state affords Petitioner Mapes an opportunity to present his appeal to the appropriate Ohio State court within 90 days, for its consideration on the merits, of the issue related to the ineffective assistance of Appellate counsel claim the court found meritorious as if it were properly and timely presented.

IT IS SO ORDERED.

_____

JUDGE SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

Filed: 2/24/94

UNITED STATES DISTRICT COURT
NOTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID A. MAPES,	)	1:91CV0056
	)	
Petitioner,	)	JUDGE FRANK J. BATTISTI
	)	(Magistrate Judge
ARTHUR TATE,	)	Jack B. Streepy)
WARDEN	)	REPORT AND RECOMMENDED
	)	DECISION OF MAGISTRATE
Respondent.	)	JUDGE

STREEPY, MAG. J.

Petitioner, David Mapes (Mapes), filed this habeas corpus petition seeking relief from his conviction of aggravated murder and the resulting death sentence in his trial in the Court of Common Pleas of Cuyahoga County, Ohio.

The jury trial was conducted in two distinct phases. The first phase, termed the "guilt phase," dealt with whether Mapes was guilty of aggravated murder and of any specification which would make him eligible for the death penalty. Since he was found guilty of aggravated murder and a death eligible specification (the trial judge found him guilty of the specification), the second phase, termed the "sentencing phase," was held. This phase dealt with the issue of whether Mapes should be sentenced to death.

For the reasons set forth below, it is concluded that the petition be denied on the finding of guilt, and conditionally

granted on the death sentence (by reason of ineffective assistance of appellate counsel).

The background facts are provided by the Supreme Court of Ohio in petitioner's direct appeal, *State v. Mapes*, 19 Ohio St.3d 108, 108-110 (1985); *cert. denied sub nom., Mapes v. Ohio*, 476 U.S. 1178 (1986);

> On January 30, 1983 at approximately 7:50 a.m., ... David Mapes, and Rodney Newton entered Chap's Bar located on Prospect Avenue in Cleveland, Ohio. The bar was closed, but one of its owners, John Allen, and four employees were present. Allen, Ronald Rucci and Michael Williams were seated at the bar. John Hovekamp and David Yun were off to the side in a section of the bar known as the "pit area," asleep. A sixth man, Frank Kuhn, was upstairs in the building.
>
> Mapes and Newton gained entrance through the rear of the building and, upon encountering the three men at the bar, Mapes aimed a sawed-off shotgun he was carrying at Rucci's head and instructed all three to put their hands on the bar. Allen began to make some gesture with his hands and Mapes shot him in the face. Allen fell to the floor, mortally wounded. At the sound of the shot, Rucci dove to the floor. Mapes ordered Williams to lie on the floor and then searched the men on the floor, including Allen, for money. Newton went first behind the bar to the cash register, and then proceeded to the video machines. While en route to the video machines, Newton spotted Yun and Hovekamp in the "pit area" and notified Mapes of their presence. Mapes ordered Rucci and Williams to crawl to the "pit area" and stood guard over the four there while Newton broke into the video games with a crowbar.

Mapes and Newton next proceeded to the back of the building where the safe was located and the liquor was stored. The two were not able to open the safe as Allen had been the only one present who knew the combination. The four men then heard a door slam and, after determining it was safe, called the police. Allen was dead when the police arrived at 8:10 a.m. The police found no one at the scene but found a broken window by the parking lot of the Town House Apartments and a garage door held open by a wooden block.

Michael Reese, upon hearing the news accounts of the murder and robbery, notified a Cleveland detective that Mapes had approached him and had attempted to recruit him for the robbery of Chap's Bar. Reese gave the police a formal written statement to this effect on February 5, 1983. On February 6, the police showed a photo array to John Hovekamp. He selected photos of three individuals whom he thought resembled the gunman. This group included a photo of [Mapes]. On the next day, a warrant for [Mapes'] arrest and a warrant to search his apartment were obtained. This search, conducted on February 8, 1983, revealed, among other things, a crowbar. [Mapes] was arrested and, when questioned, he told the police that he had merely prepared an entrance to the bar, but that Newton and a man named Red had committed the robbery. On February 11, 1983, a lineup was held at which Hovekamp positively identified [Mapes] as the man carrying the shotgun within the premises where the robbery and murder occurred.

Newton was arrested on March 4, 1983 in Akron and was interviewed by Cleveland police on March 7.

He gave a full written statement to police recounting the events at the bar consistent with the accounts of the bar employees and the police investigation. This written statement was introduced at trial and Newton testified at trial. Newton also indicated that [Mapes] had returned to his own apartment and dropped unused shells down a drainpipe and arranged to dispose of the gun. After obtaining a warrant, the police found a shell in the hole indicated by Newton. The shell was the same type that was used kill Allen.

Rucci positively identified [Mapes] during trial as the man who shot Allen with a sawed-off shotgun. Hayward Chambers testified at trial that [Mapes] had admitted to him that he had robbed Chaps and killed Allen. [Mapes'] wife and a neighbor, Christine Alexander, both testified that [Mapes] owned a sawed-off shotgun.

[Mapes] was indicted for two counts of aggravated murder under R.C. 2903.01(B). One count charged that the murder occurred during the course of an aggravated robbery. The other count charged that the murder occurred during the course of an aggravated burglary. Each of these counts had four identical specifications as follows: Under R.C. 2929.04(A)(7), one death-penalty specification alleging the offense occurred in the course of an aggravated robbery; under R.C. 2929.04(A)(7), one death-penalty specification alleging the offense occurred in the course of an aggravated burglary; under R.C. 2929.04(A)(5), one death-penalty specification alleging a prior murder conviction; and, under R.C. 2941.141, one firearm specification. In addition to the death-penalty charges, Counts Three, Four, and Five each charged aggravated robbery

under R.C. 2911.01, and Count Six charged aggravated burglary under R.C. 2911.11.

The jury returned a verdict finding [Mapes] guilty of both counts of aggravated murder under R.C. 2903.01(B), but not guilty of the death-penalty specifications charged under R.C. 2929.04(A)(7). [Mapes] was found guilty of the firearm specification as well as Counts Four, Five, and Six. [Mapes] was found not guilty of Count Three.

The issue of whether [Mapes] was guilty of the prior murder specification under R.C. 2929.04(A)(5) was tried separately to the court. The court received into evidence an indictment from Passaic County, New Jersey, charging [Mapes] with murder. Also received was a judgment of conviction entered upon [Mapes'] plea of *non vult*. The court found [Mapes] guilty of the prior murder specification under R.C. 2929.04(A)(5).

At the sentencing phase of the trial, [Mapes] made a statement on his own behalf, but presented no other witnesses. The jury returned a recommendation that the death penalty be imposed. The trial court sentenced [Mapes] to death on the two counts of aggravated murder and to terms of imprisonment on Counts Four, Five, and Six, to run consecutively.

The State Court Proceedings

As noted above, on direct appeal the Court of Appeals affirmed the finding of guilt and imposition of the death penalty, as did the Supreme Court of Ohio. *Id.*

Petitioner later filed a post-conviction petition, which was denied by the trial court. Respondent's Exhibit, hereafter

RX, Q. The decision was affirmed by the Ohio Court of Appeals. RX T. The Supreme Court of Ohio dismissed the appeal and motion to certify without opinion, RX X, and denied two motions for rehearing. RX Z, BB. The Supreme Court of the United States denied a petition for writ of certiorari. RX CC.

Mapes then filed this petition for writ of habeas corpus. In his second amended petition (SAP), he alleges 15 grounds for relief:

(1) "The representation of trial counsel fell below any objective standard of reasonable professional competence. Direct and substantial prejudice resulted from these unprofessional errors which resulted in petitioner's death sentence. Petitioner was denied the effective assistance of counsel guaranteed by the state and federal constitutions." SAP at 11.

(2) "The representation of appellate counsel fell below any objective standard of reasonable professional competence in that counsel failed to recognize numerous nonfrivolous appellate issues. Direct and substantial prejudice resulted in that petitioner's conviction and death sentence were affirmed. As a result of these errors and this prejudice, petitioner was denied the effective assistance of appellate counsel as guaranteed by the state and federal constitutions." SAP at 35.

(3) "Statements made by the court, prosecution and defense counsel during voir dire, closing argument and instructions contained in the jury charge son misinformed the jury and diminished their sense of responsibility as to give rise to violations of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution." SAP at 62.

(4) "Petitioner's right to meaningful appellate review of the death sentence was denied because the record is devoid of any mitigation and because the reviewing court would not have articulated and considered the mitigating factors even if they had been present." SAP at 68.

(5) "Petitioner's state and federal constitutional rights are violated by the death sentence imposed in this case because the aggravated felony-murder conviction is based on imputed intent rather than petitioner's own specific intent." SAP.

(6) "Petitioner was convicted and sentenced by a jury that was neither fair and impartial nor composed of a fair cross section of the community, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution," and "Culling the jury of death penalty opponents results in a jury which is more prone to convict the defendant and is therefore not impartial." SAP at 76.

(7) "The trial court accepted the recommendation of death from the jury in spite of the fact that the jury poll raised a substantial question about the unanimity of the verdict. Petitioner's sentence of death is therefore in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution." SAP at 82.

(8) "Petitioner's right to a fair trial was violated as the result of the trial judge's bias and prejudice." SAP at 85.

(9) "The trial court erred when it found petitioner guilty of the aggravating circumstance at a hearing wherein the court entertained nothing but evidence of the prior *non vult* plea in spite of the fact that the record suggested a realistic likelihood that petitioner did not commit a prior purposeful killing. In so limiting the hearing the court violated the due

process and cruel and unusual punishment provision of the Federal Constitutions [sic]." SAP at 86.

(10) "Use of petitioner's *non vult* plea to a prior New Jersey homicide as the death specification to the Ohio aggravated murder charge violated Rule 11(B)(2), Ohio Rules of Criminal Procedure, and Rule 410, Ohio Rules of Evidence. The trial court recognized a *non vult* plea and relied upon it in deciding that petitioner was guilty of the specification in the case at bar. This was in specific violation of the Ohio Rules of Evidence and the Ohio Rules of Criminal Procedure, and constituted a violation of due process and equal protection under the federal constitution. The state court finding that the trial court did not relay upon The *non vult* plea is not supported by and specifically contradicted in the record." SAP at 88.

(11) "Ohio Revised Code §2929.03 requires the use of the same jury at both trial and penalty phase in a capital case. This requirement is unconstitutional as it denies petitioner due process of law, a fair and impartial jury, the effective assistance, and the equal protection of the law in violation of the Sixth and Fourteenth Amendments to the United States Constitution. Further, the Eighth Amendment to the United States Constitution is violated because such a procedure results in arbitrary and capricious impositions of death." SAP at 91-92.

(12) "The jury verdicts returned in this case are inherently inconsistent and constitute a due process violation. A sentence of death under such circumstances is arbitrary and capricious and constitutes a violation of the Eighth Amendment to the United States Constitution." SAP at 92.

(13) "Petitioner was denied due process of law by the state court prosecutors' cumulative conduct including the suggestion of petitioner's homosexuality, comment upon his

right not to testify, and introduction by innuendo of uncharged misconduct." SAP at 93.

(14) "Petitioner was denied due process of law and an impartial jury by the trial court's refusal to grant individual sequestered voir dire." SAP at 95.

(15) "Petitioner was entitled to be represented by counsel at his arraignment on the charges for which he stood trial and was indicted. He was not and this violates due process." SAP at 98-99.

Each of petitioner's 15 grounds for relief fall into one of three categories: (1) the ground relates only to the guilt phase; (2) the ground relates only to the sentencing phase; (3) the ground is a hybrid in that it relates to both phases, *e.g.*, the ineffectiveness of counsel grounds. Discussion of the 15 grounds will be divided, more or less chronologically, into the guilt phase, then the sentencing phase. A hybrid ground will be partially discussed in the guilt phase and partially discussed in the sentencing phase. Thus, the 15 grounds will not be discussed in the numerical order presented by petitioner.

I. Procedural Issues

A. Exhaustion (Ground 2)

Respondent has moved to dismiss the petition for failure to exhaust available state court remedies in accordance with 28 U.S.C. §2254(b) and (c). Respondent argues that petitioner has not exhausted his state remedies with respect to his claim of ineffective assistance of appellate counsel (Ground 2). Thus, respondent argues that the federal habeas corpus petition should be dismissed while petitioner exhausts these remedies in the state court, pursuant to *Rose v. Lundy*, 455 U.S. 509, 522 (1982).

On February 19, 1992, approximately one year after this petition had been filed, the Supreme Court of Ohio established the following procedure to raise the claim of ineffective assistance of appellate counsel, *State v. Murnahan*, 63 Ohio St.3d 60 (1992):

> Claims of ineffective assistance of appellate counsel may be raised in an application for reconsideration in the court of appeals or in a direct appeal to the Supreme Court pursuant to Section 2(B)(2)(a)(iii), Article IV of the Ohio Constitution ....
>
> Where the time period for reconsideration in the court of appeals and direct appeal to the Supreme Court has expired, a delayed claim of ineffective assistance of appellate counsel must first be brought in an application for delayed reconsideration in the court of appeals where the alleged error took place, pursuant to App. R. 26 and 14(B), and if delayed reconsideration is denied then the defendant may file for delayed appeal in the Supreme Court, pursuant to Section 8, Rule II of the Rules of Practice of the Supreme Court.

Id. at ¶¶2, 3 of syllabus.

Petitioner did not follow the then unknown *Murnahan* procedures. Instead, he had sought to raise the issue of ineffective assistance of appellate counsel in his motion for post-conviction relief. RX P. The court of common pleas denied his claim on procedural grounds. RX Q, at 6. On appeal, the Court of Appeals of Ohio, Eighth District, denied the issue on procedural grounds. RX T, at 6-7. Petitioner attempted to appeal this and other issues to the Supreme Court of Ohio, *see* RX U, at 8-9, but the Supreme Court

refused to accept jurisdiction on the ground that no substantial constitutional question was presented. RX X.

On July 31, 1990, petitioner filed a motion for rehearing in the Ohio Supreme Court, which was denied September 5, 1990. RX Y.

On November 23, 1990, petitioner filed a "Motion for Reconsideration in Light of Conflict Certification of *State v. Murnahan*," pointing out that there was conflict among the Ohio courts of appeals regarding claims of ineffective assistance of appellate counsel, and that the Ohio Supreme Court had just accepted certification of the *Murnahan* case on that issue. RX AA. The Supreme Court denied this motion on December 19, 1990. RX BB. Petitioner then filed his original petition for a writ of habeas corpus in this court on January 10, 1991, more than one year prior to the *Murnahan* decision.

Prior to *Murnahan*, the proper procedure under Ohio law to raise the issue of ineffective appellate counsel was not clear, *Manning v. Alexander*, 912 F.2d 878 (6th Cir. 1990). In *Manning*, the petitioner raised a claim of ineffective assistance of appellate counsel in a post-conviction petition in the Ohio Court of Common Pleas, which was denied. He appealed to the Ohio Court of Appeals, which ruled *sua sponte* there was no cognizable claim of ineffective assistance of appellate counsel in a post-conviction relief action pursuant to Ohio Revised Code §2953.21. Manning was denied leave to appeal to the Supreme Court of Ohio, on the basis that the appeal did not present a substantial constitutional question. He then filed a federal habeas corpus petition. *Id.*, at 880. The district court dismissed Manning's petition, finding he had not exhausted state remedies. *Id.* The Sixth Circuit reversed, stating:

State prisoners must exhaust their state remedies prior to raising claims in federal habeas corpus proceedings. 28 U.S.C. §2254(b), (c); *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). The exhaustion requirement is satisfied when the highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims.... "The factual and theoretical substance of a claim must be presented to state courts to render it exhausted for federal habeas corpus purposes." ...

This case concerns only the issue of whether Manning exhausted his state remedies regarding his ineffective assistance of appellate counsel claim. We believe that he did. Manning first sought review of his ineffective assistance of appellate counsel claim in an Ohio Common Pleas Court which denied his petition. He then raised the issue in the Ohio Court of Appeals which held that he improperly raised his claim under Ohio procedural laws. He then sought review in the Supreme Court of Ohio, *inter alia*, of the procedural decision of the Court of Appeals and his claim of ineffective assistance of appellate counsel. The Supreme Court of Ohio dismissed his appeal and Manning sought relief under 28 U.S.C. §2254.

* * *

In this case...Manning pursued an appropriate remedy when he filed his §2953.21 petition and followed through with his claim to the Supreme Court of Ohio. To exhaust his or her remedies, a petitioner for federal habeas corpus relief is only required to raise his claims before the state's highest court. The fact that the state court does not address the merits of the claim does not preclude a finding of exhaustion. *Harris v. Rees*, 794 F.2d 1168, 1173 (6th Cir. 1986).

> Whatever refinements the Supreme Court of Ohio makes in this area of Ohio procedure are, of course, matters of state law. For the purposes of federal habeas corpus's exhaustion requirement, however, we hold that Manning adequately presented his ineffective assistance of appellate counsel claim to the Supreme Court of Ohio. As a result, the Supreme Court of Ohio had a full and fair opportunity to consider the claims raised in Manning's petition for habeas corpus relief. Consequently the exhaustion requirements of 28 U.S.C. §2254 and *Rose v. Lundy*, 455 U.S. 509 ... were fulfilled by Manning.

Id. at 880-83.

Under *Manning*, petitioner exhausted his state remedies. A change in substantive state law occurring after a federal habeas corpus petition is filed does not trigger a re-exhaustion requirement. *Crisp v. Mayabb*, 668 F.2d 1127 (10th Cir. 1981), *cert denied sub nom., Fields v. Paul M.*, 459 U.S. 827 (1982). *Manning* indicates Mapes is not required to return to state court. Petitioner has exhausted state remedies.

(3)

Supreme Court, U.S.
FILED

99 203 JUL 29 1999

OFFICE OF THE CLERK

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

RALPH COYLE, WARDEN,

Petitioner

vs.

DAVID A. MAPES

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II

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I.B. State Procedural Waiver

Respondent contends that petitioner failed to raise seven of his fifteen claims on direct state appeal, thus he has waived them. Respondent claims petitioner's first (improper *voir dire*), third (ineffective assistance of trial counsel), fourth (lack of meaningful appellate review of death sentence), seventh (improper jury poll), twelfth (inconsistent jury verdicts), thirteenth (prosecutorial misconduct), and fifteenth (denial of right to counsel at arraignment) grounds for relief have been waived by reason of a state procedural waiver rule.

1. Grounds 13 and 15

Petitioner concedes that he has waived grounds 13 (prosecutorial misconduct) and 15 (denial of right to counsel at arraignment) and will not prosecute them further. Petitioner's Traverse (hereafter Traverse), at 63.

2. Grounds 1, 3, 4 and 7

Petitioner contends these four grounds have not been waived. The Court of Appeals' decision on petitioner's post-conviction petition determined that grounds 1, 3, 4 and 7 were barred by *res judicata* for failure to raise them on direct appeal, RX T, at 5-6, 8-10. Where a state court judgment on a particular claim rests on independent and adequate state procedural grounds, the federal court may not review it in a federal habeas petition, absent a showing of cause and prejudice. *Wainwright v. Sykes*, 433 U.S. 72 (1977). A state procedural ground is established when the last state court rendering a decision on a constitutional claim states that its judgment rests on a state procedural bar. *Harris v. Reed*, 489 U.S. 255 (1989).

The Supreme Court of Ohio, *sua sponte*, dismissed the post-conviction appeal therefrom "for the reason that no substantial constitutional question exists." RX X. No further reasoning was given.

With regard to such formulary orders:

> State procedural bars are not immortal, however; they may expire because of later actions by state courts. If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal court review that might otherwise have been available. *See Harris*, 489 U.S. at 262....
>
> The problem we face arises, of course, because many formulary orders are not meant to convey **anything** as to the reason for the decision. Attributing a reason is therefore both difficult and artificial. We think that the attribution necessary for federal habeas purposes can be facilitated, and sound results more often assured, by applying the following presumption: where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. If an earlier opinion "fairly appear[s] to rest primarily upon federal law," *Coleman v. Thompson*, 115 L.Ed.2d 640, 659 (1991)]... we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place. Similarly where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits.

Ylst v. Nunnemaker, 111 S.Ct. 2590, 2593-94 (1991) (emphasis in original).

Thus, under *Ylst*, the court of appeals decision was the "last reasoned decision," and it denied grounds 1, 3, 4 and 7 solely on the basis of state procedural default. The Supreme Court dismissal was a "later unexplained order" under *Ylst*.

As a result, federal habeas review of grounds 1, 3, 4 and 7 is barred, unless petitioner can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 111 S.Ct. 2546, 2565 (1991).

Concerning his fourth ground for relief, petitioner claims "it was impossible for petitioner to raise this issue on direct appeal when the violation first occurred during the direct appeal process. The issue was raised in the post-conviction petition and the state courts were given a full and fair opportunity to address the issue, but declined to do so." Petitioner's Traverse, at 75. This is merely an argument that the Ohio Court of Appeals was wrong in concluding there was a state procedural waiver. It is not the federal court's duty to review a state court determination that a state procedural default has occurred. *See Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988) ("The federal habeas court does not act as an additional state appellate court to review a state court's interpretation of its own law or procedure.") Petitioner's fourth ground for relief has been waived since he has not established cause or prejudice.

Petitioner asserts that ineffective assistance of appellate counsel constituted cause and prejudice concerning his first, third, and seventh grounds for relief, because counsel was

ineffective for failing to raise these claims on direct appeal. The Supreme Court has recently held:

> *Murray v. Carrier* considered the circumstances under which attorney error constitutes cause. *Carrier* argued that his attorney's inadvertence in failing to raise certain claims in his state appeal constituted cause for the default sufficient to allow federal habeas review. We rejected this claim, explaining that the costs associated with an ignorant or inadvertent procedural default are not less than where the failure to raise a claim is a deliberate strategy: it deprives the state courts of the opportunity to review trial errors. When a federal habeas court hears such a claim, it undercuts the State's ability to enforce its procedural rules just as surely as when the default was deliberate. 477 U.S., at 487.... We concluded: "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, ... we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." *Id.*, at 488....
>
> * * *
>
> We explained clearly that "cause" under the cause and prejudice test must be something **external** to the petitioner, something that cannot fairly be attributed to him: "[W]e think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." 477 U.S., at 488.... For example, "a showing that the factual or legal basis for a claim was not reasonably available to counsel, ... or that 'some interference by officials' ...

> made compliance impracticable, would constitute cause under this standard." *Ibid. See also id.*, at 492, 91 L.Ed.2d 397, 106 S.Ct. 2639 ("[C]ause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim").
>
> Attorney ignorance or inadvertence is not "cause" because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must "bear the risk of attorney error." *Id.*, at 488... Attorney error that constitutes ineffective assistance of counsel is cause, however.... [I]t is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor, i.e., "imputed to the State."

Coleman, 111 S.Ct. at 2566-67 (emphasis in original).

Under *Murray* it must be determined if appellate counsel rendered ineffective assistance for failing to raise petitioner's first, third, and seventh grounds for relief. It is concluded that appellate counsel was not ineffective for failing to raise these grounds on appeal. Since the reasoning for this conclusion involves significant consideration of the merits of the underlying issue, the reasoning is set forth in sections II.E. and III.B. (Ground 1), III.C. (Ground 3), and III.E. (Ground 7), *infra*.

3. Ground 12

Respondent contends that petitioner has waived his twelfth claim concerning inconsistent jury verdicts because he failed to fairly present it as a constitutional claim before the state courts. Petitioner did not raise the issue in constitutional terms in his brief on direct appeal, RX G, K,

nor did the Appellate Court or Supreme Court discuss it in terms of a constitutional issue. RX I, pp. 17-19; *Mapes*, 19 Ohio St.3d at 112-13.

A claim is not fairly presented if the constitutional issue was not presented, even if the underlying facts were presented. *Anderson v. Harless*, 459 U.S. 4 (1982). Petitioner did not fairly present this claim to the state courts as a federal constitutional claim, see *Franklin v. Rose*, 811 F.2d 322, 326 (6th Cir. 1987). Nonetheless, since he has already taken a direct appeal, he has exhausted state remedies. *Keener v. Ridenour*, 594 F.2d 581 (6th Cir. 1979). He cannot now raise the constitutional claim in Ohio courts, thus he has committed a state procedural default and waived it under *Sykes, supra*; see *Leroy v. Marshall*, 757 F.2d 94 (6th Cir. 1983), *cert. Denied sub nom., Leroy v. Morris*, 474 U.S. 831 (1985).

To summarize, seven grounds must be denied by reason of state procedural waiver. They are grounds 1, 3, 4, 7, 12, 13 and 15.

II. The Guilt Phase

A. Denial of Counsel (Ground 15)

Petitioner contends he was not represented by counsel at his arraignment, which was a denial of due process. Petitioner concedes he waived this issue, see section I.B., *supra*.

B. Prejudicial Voir Dire (Ground 14)

Petitioner contends he was denied due process and an impartial jury by reason of the trial court's refusal to grant the defense request for individual sequestered voir dire. The court conducted the voir dire in a group session with all

members of the venire panel present. Thus, each member was present at the questioning of all other members. The voir dire included "death qualification" questions pursuant to *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

Petitioner contends the jurors were desensitized by the group[1] voir dire process. He points out that in addition to the death qualification questions, numerous potential jurors stated they or their families had been victims of crime, and argues this resulted in a jury that was neither fair nor impartial. SAP at 95-97.

This issue was considered and denied in *Byrd v. Armontrout*, 686 F.Supp. 743, 763 (E.D. Mo. 1988), *aff'd* 880 F.2d 1 (8th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990):

> [S]equestered individual death qualifying voir dire is not constitutionally dictated. The death qualifying voir dire may be conducted in groups, and the fact that it is conducted in groups does not, without more, result in a[ ] [ ]partial jury. *Trujillo v. Sullivan*, 815 F.2d 597, 606-07 (10th Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 296, 98 L.Ed.2d 256 (1987); *McCorquodale v. Balkcom*, 721 F.2d 1493, 1495-1496 (11th Cir. 1983), *cert. denied*, 466 U.S. 954, 104 S.Ct. 2161, 80 L.Ed.2d 546 (1984); *see Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (Upholding death penalty based upon a death qualified jury where individual jurors

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[1] The transcript indicates the twelve-member jury was chosen from the first panel in about three days. Voir dire began on the afternoon of Monday, May 2, Tr. 412, and ended on the afternoon of Thursday, May 5, Tr. 1125. Alternates were selected from a new panel with the twelve selected jurors absent. Tr. 1174-76.

were death qualified in the presence of the other jurors. 477 U.S. at 176-78, 106 S.Ct. at 2469-71). Further, assuming that group voir dire death qualification does result in a more "conviction-prone" jury, that fact would not mean that petitioner was denied his right to a jury selected from a fair cross-section of the community, *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 1764-1766, 90 L.Ed.2d 137 (1986), or his right to an impartial jury. *Id.* 106 S.Ct. at 1767-1770.

Petitioner relies on one authority, *Hovey v. Superior Court of Alameda County*, 28 Cal. 3d 1, 616 P.2d 1301 (Cal. 1980), which was distinguished in *Trujillo v. Sullivan*, 815 F.2d 597 (10th Cir.), *cert. denied*, 484 U.S. 929 (1987), the court noting that *Hovey* did not rely on the United States Constitution. *Trujillo* did note there "may be a case where *en masse* death-qualifying *voir dire* may be so egregious and may taint the jury that the process denies the defendant his constitutional right to an impartial jury." *Id.* at 607. Such a case was not present in *Trujillo*; *see also*, *McCorquodale v. Balkcom*, 721 F.2d 1493 (11th Cir. 1983), *cert. denied*, 466 U.S. 954 (1984); *Jones v. Kemp*, 706 F.Supp. 1534 (N.D. Ga. 1989), nor does the voir dire herein present such a case.

After the trial judge questioned each potential juror, both parties were permitted to examine, with few limitations on the questions asked. Petitioner argues that the venire was tainted by several stories of violent crimes. Five of those were in the presence of the original venire, from which the 12-member jury was selected. Tr. 445-447, 449, 947, and 1044-45. In one instance, the court allowed questioning of a prospective juror in chambers to avoid this possibility. Tr. 952-956. A review of the transcript reveals there were no prejudicial or egregious comments made before the rest of the venire. The voir dire gave both sides the opportunity to

discover bias or prejudice and comported with due process. *Trujillo, supra*, at 607.

II.C. Biased Jury (Ground 6)

Petitioner contends that the court excluded "all principled jurors" because of their beliefs concerning the death penalty, in violation of the Fifth, Sixth, and Fourteenth Amendments. Petitioner argues that the "death qualification" voir dire resulted in a jury more prone to convict, thus not impartial, nor a fair cross section of the community. Petitioner contends that because Ohio bifurcates the guilt and sentencing phases, a venire person's views on the death penalty are irrelevant with respect to the guilt phase of the trial. SAP at 76-82.

Lockhart v. McCree, 476 U.S. 162 (1986), rejects all of petitioner's arguments. In that case, the petitioner, McCree, argued that the removal of death qualified jurors prior to the guilt phase of a bifurcated capital trial violated the Sixth and Fourteenth Amendments of the Constitution. The Court rejected the 15 studies[2] McCree used to support his contention that the jury was not impartial, finding them insufficient to make a constitutional claim. The Court also stated:

> Having identified some of the more serious problems with McCree's studies, however, we will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that "death qualification" in fact produces juries somewhat more "conviction-prone" than non-death-qualified" juries. We hold, nevertheless, that

[2] Some of the studies advanced as evidence in the *Lockhart* case are the same that petitioner seeks to introduce here, *i.e.*, studies by Ellsworth and Haney.

the Constitution does not prohibit the States from "death-qualifying" juries in capital cases.

The Eighth Circuit ruled that "death qualification" violated McCree's right under the Sixth Amendment, as applied to the States via incorporation through the Fourteenth Amendment, ... to a jury selected from a representative cross sec on of the community. But we do not believe that the fair-cross-section requirement can, or should, be applied as broadly as that court attempted to apply it. We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.... The limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly "representative" petit jury.... We remain convinced that an extension of the fair-cross-section requirement to petit juries would be unworkable and unsound, and we decline McCree's invitation to adopt such an extension.

But even if we were willing to extend the fair-cross-section requirement to petit juries, we would still reject the Eighth Circuit's conclusion that "death qualification" violates that requirement. The essence of a "fair-cross-section" claim is the systematic exclusion of "a 'distinctive' group in the community." ...In our view, groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors, such as the "*Witherspoon*-excludables" at issue here, are not "distinctive groups" for fair-cross-section purposes.

* * *

Our prior jury-representative cases, whether based on the fair-cross-section component of the Sixth Amendment or the Equal Protection Clause of the Fourteenth Amendment, have involved such groups as blacks, ...women, ...and Mexican-Americans.... The wholesale exclusion of these large groups from jury service clearly contravened all three of the aforementioned purposes of the fair-cross-section requirement. Because these groups were excluded for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case, the exclusion raised at least the possibility that the composition of juries would be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the common-sense judgment of the community. In addition, the exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably gave rise to an "appearance of unfairness." Finally, such exclusion improperly deprived members of these often historically disadvantaged groups of their right as citizens to serve on juries in criminal cases.

The group of "*Witherspoon*-excludables" involved in the case at bar differs significantly from the groups we have previously recognized as "distinctive." "Death qualification," unlike the wholesale exclusion of blacks, women, or Mexican-Americans from jury service, is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at

both the guilt and sentencing phases of a capital trial. There is very little danger, therefore, and McCree does not even argue, that "death qualification" was instituted as a means for the State to arbitrarily skew the composition of capital-case juries.

Furthermore, unlike blacks, women, and Mexican-Americans, "*Witherspoon*-excludables" are singled out for exclusion in capital cases on the basis of an attribute that is within the individual's control. It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law. Because the group of "*Witherspoon*-excludables" includes only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case, "death-qualification" hardly can be said to create an "appearance of unfairness."

* * *

In sum, "*Witherspoon*-excludables," or for that matter any other group defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case, may be excluded from jury service without contravening any of the basic objectives of the fair-cross-section requirement. See *Lockett v. Ohio*, 438 U.S. 586, 597 (1978) ("Nothing in *Taylor*, however, suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the, trial judge"). It is for this reason that we conclude that

> "*Witherspoon*-excludables" do not constitute a "distinctive group" for fair-cross-section purposes, and hold that "death qualification" does not violate the fair-cross-section requirement.

Id. at 173-77 (citations omitted).

Concerning McCree's assertion that the jury was not impartial because it was "slanted" in favor of conviction due to the absence of "*Witherspoon*-excludables," the Court said:

> McCree's "impartiality" argument apparently is based on the theory that, because all individual jurors are to some extent predisposed towards one result or another, a constitutionally impartial jury can be constructed only by "balancing" the various predispositions of the individual **jurors.** Thus, according to McCree, when the State "tips the scales" by excluding prospective jurors with a particular viewpoint, an impermissibly partial jury results. We have consistently rejected this view of jury impartiality, including as recently as last Term when we squarely held that an impartial **jury** consists of nothing more than "**jurors** who will conscientiously apply the law and find the facts." *Wainwright v. Witt*, 469 U.S. 412, 423 (1985) (emphasis added); see also *Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it"); *Irvin v. Dowd*, *supra*, at 722 ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors").
>
> The view of jury impartiality urged upon us by McCree is both illogical and hopelessly impractical. McCree characterizes the jury that convicted him as "slanted" by the process of "death qualification." But

> McCree admits that exactly the same 12 individuals could have ended up on his jury through the "luck of the draw," without in any way violating the constitutional guarantee of impartiality. Even accepting McCree's position that we should focus on the **jury** rather than the individual **jurors**, it is hard for us to understand the logic of the argument that a given jury is unconstitutionally partial when it results from a state ordained process, yet impartial when exactly the same jury results from mere chance. On a more practical level, if it were true that the Constitution required a certain mix of individual viewpoints on the jury, then trial judges would be required to undertake the Sisyphean task of "balancing" juries, making sure that each contains the proper number of Democrats and Republicans, young persons and old persons, white-collar executives and blue-collar laborers, and so on. Adopting McCree's concept of jury impartiality would also likely require the elimination of peremptory challenges, which are commonly used by both the State and the defendant to attempt to produce a jury favorable to the challenger.

Id. at 177-79 (emphasis in original).

Petitioner's claim is without merit.

II.D. Trial Judge Bias (Ground 8)

Petitioner asserts that he was denied a fair trial because the trial judge was biased against him. Unless they amount to constitutional violations, prejudicial comments and conduct by a judge in a criminal trial is not subject to collateral attack following conviction. *Brinlee v. Crisp*, 608 F.2d 839, 852-53 (10th Cir. 1979), *cert. denied*, 444 U.S. 1047 (1980). The test is whether the errors alleged could have rendered the trial fundamentally unfair. To violate petitioner's constitutional

right to a fair trial the intervention by a trial judge in the conduct of a criminal trial would have to reach a significant extent and be adverse to the petitioner to a substantial degree. *McBee v. Grant*, 763 F.2d 811, 817 (6th Cir. 1985).

Petitioner also claims that appellate counsel was ineffective for failing to raise the issue on appeal, see section II.F, *infra*. While appellate counsel failed to raise the issue of trial judge bias on direct appeal, petitioner's new counsel raised it in the post-conviction petition (RX P, p.117 ff.). The trial court held that petitioner had committed a state procedural waiver in failing to raise the issue on direct appeal (RX Q, p.9). The Ohio Court of Appeals considered the issue on the merits. (RX T) That court noted in part that petitioner "contends the trial court was biased and the facts needed-to support this charge exist outside the record." (RX T, p.12), and further that petitioner stated said facts "did not become known until after the direct appeal" (*ibid*). The court considered the issue on the merits; however, the court concluded that "appellant [petitioner] has not provided this court with any facts that would suggest bias." (*Id.*, p.13) Under these circumstances, appellate counsel was not ineffective.

Petitioner states there is evidence of bias outside the record and seeks an evidentiary hearing thereon. Petitioner does not have a right to a hearing based on no more than allegation. Whether to hold a hearing depends on the existence of a factual dispute, the strength of the proffered evidence, the thoroughness of prior proceedings, and the nature of the state court determination. *Pagan v. Keane*, 984 F..2d 61, 64 (2d Cir. 1993). Petitioner has failed to show a hearing should be held, but he has submitted two affidavits which must be considered further.

Since 1990, after exhausting state appeals, petitioner claims to have obtained "new evidence" of bias. On

September 11, 1991, petitioner filed his traverse to the return of writ. In support of his claim of trial judge bias, he submitted the unsigned affidavits of June Chatman, one of the 1983 jurors in petitioner's case, and her husband. (Traverse, at 56-57) On September 20, petitioner moved to amend the traverse by filing their signed affidavits. The affidavits had been signed on September 17, 1991.

In her affidavit, June Chatman contends she was pressured by the trial judge and other jurors to reach a verdict of guilty. The judicial pressure came from the judge's attempt to intimidate her by discounting her health complaints and refusing to allow her to seek medical attention as requested. She also felt the trial judge was biased against petitioner, which affected the judge's rulings during the trial and his treatment of the jurors. She states she signed the death verdict forms only because of pressure from the trial judge and other jurors, as well as fear of her own health. (See affidavit of June Chatman attached to petitioner's "Motion to Amend Traverse.") June Chatman's husband stated that he was called by the trial judge the evening of June 3, the evening before the last date his wife served as a juror, and asked him why his wife was not agreeing to go along with the rest of the crowd and holding out from convicting petitioner. (See affidavit of Charles Chatman, attached to petitioner's "Motion to Amend Traverse.")

Initially, it is noted that much of the June Chatman affidavit is not admissible evidence, under Rule 606(b) of the Ohio and Federal Rules of Evidence. Moreover, Mr. Chatman does not allege, nor does Mrs. Chatman allege, that he informed his wife of the trial judge's comments to him and Mrs. Chatman does not state that her ultimate decision on the verdict would have been different but for the alleged pressure from the trial judge. Her claim that the trial judge "discounted" her health complaints is belied by the record,

which shows-that on June 3, 1983, the trial judge suspended the trial and ordered that she be taken to the hospital to tend to her medical problems. Since the jury was sequestered, it was necessary to send court personnel with her to the hospital. (Tr. 4218-20)

Respondent contends that petitioner has, through a state procedural bar, waived his right to have this court consider the Chatman affidavits because petitioner failed to present them to the Ohio courts. To be entitled to have the Chatman affidavits considered, petitioner must show cause for, and demonstrate actual prejudice from, his failure to present them in the Ohio courts. *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715 (1992). This rule applies to situations such as the present in which no evidentiary hearing was held in the state court. See *U.S. ex rel. Free v. Peters*, 806 F.Supp. 705, 710-11 (N.D. Ill. 1992) (adopting the report and recommendation of the magistrate judge, at 818 F.Supp. 1098, 1114 (N.D. Ill. 1992)).

Establishing cause ordinarily requires a showing of some external impediment which prevented counsel from obtaining the evidence. *Tamayo-Reyes*, 112 S.Ct. at 1720-20 n.5; *U.S. ex rel. Free*, 806 F.Supp. at 710. One aspect of cause is whether the new evidence could have been discovered earlier in the exercise of due diligence, *Cornell v. Nix*, 976 F.2d 376, 380 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1820 (1993).

June Chatman has been known to petitioner since 1983 when she was a juror in his case. Nonetheless, petitioner did not obtain the Chatman affidavits for eight years, until after he filed the petition *sub judice*. Petitioner has not shown that due diligence would not have obtained the Chatman affidavits in time to present them to the Ohio courts during the approximate seven years his case was before an Ohio court. He has failed to establish cause.

The remaining evidence of bias needs little discussion. Petitioner-makes numerous citations to the record in support of his claim of bias. SAP 49-51. None of those citations show bias. Most reflect court rulings which were adverse to petitioner.

Petitioner also complains that the judge stated "halfway through trial that the evidence is 'overwhelming'" against petitioner. The court made this observation in chambers on a Rule 29 motion for acquittal, when finding there was sufficient evidence of guilt for the case to go to the jury. Tr. 3431-39. His ruling was correct.

Petitioner's characterization of Judge Kilbane's statement to the jury about the costs of capital cases as a "complaint" does not show bias, particularly since he corrected himself. (Tr. 404-05)

As discussed more fully elsewhere, the *voir dire* was not prejudicial, the jury poll was not improper, and jury instructions in this case were not inappropriate (with one exception in the sentencing phase). The judge's rulings and proceedings therein do not indicate bias.

Petitioner notes there were many unrecorded side bar conferences which he claims occurred under "suspicious circumstances." Nothing suggests the side bar conferences were "suspicious."

Petitioner contends the judge sequestered the jury after the guilt phase although the jury had acquitted petitioner of the aggravating circumstances tried to it. To dismiss the jury pending the court's determination of the remaining claim of an aggravating circumstance (the prior New Jersey murder), would

have been premature since Ohio law requires the same jury convict and sentence a capitally charged defendant. *State v. Penix*, 32 Ohio St. 3d 369 (1987) (syllabus). Petitioner has failed to establish the trial judge was biased.

II.E. Ineffective Assistance of Trial Counsel (Ground 1)

Petitioner's first ground, claiming ineffective assistance of trial counsel, was not appealed, thus this issue will be considered in the context of whether appellate counsel was ineffective for failing to raise it. See section I.B., *supra*. The test of effectiveness for appellate and trial counsel follows the test in *Strickland v. Washington*, 466 U.S. 668 (1984). For appellate counsel, the prejudice component of *Strickland* requires a showing of reasonable probability that the result of the appeal would have been different. *Smith v. Jago*, 888 F.2d 399, 405, n.1 (6th Cir. 1989), *cert. denied sub nom., Smith v. Alexander*, 495 U.S. 961 (1990).

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions the accused has the right to the effective assistance of counsel. *Strickland, supra*, adopted a two part standard for evaluating claims of ineffective assistance of counsel. First, "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Second, he must show counsel's deficiencies "prejudiced the defense." *Id.* at 698-88. The "prejudice" requirement is based on the Court's conclusion that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691.

Strickland notes it is not necessary to examine the first part (whether counsel's performance was deficient) if examination of the second part (whether counsel's performance was prejudicial) settles the issue. *Id.* at 697. In the second part, the court must inquire whether petitioner has shown there is a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Id.* at 694. Thus (on the guilt phase), "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

The totality of the evidence before the jury must be considered. Some errors of counsel might have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, while others will have had an isolated, trivial effect. A verdict only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking account of the effect of the errors, "a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id.* at 695-96.

The guilty verdict in this case was strongly supported by the evidence. There were eyewitnesses who saw petitioner commit the crime. John Hovekamp positively identified Mapes as being at the crime in possession of a shotgun. Tr. 2454. Ron Rucci identified the defendant as having been in the bar the night before the crime. Tr. 2151. Rucci described the murderer as 5'8" to 5'-10," with a mustache and wearing a leather jacket, Tr. 2144, as did Mike Williams, Tr. 2217. At the time of the robbery, Mapes was wearing a bluish-black leather jacket. Tr. 2331. Finally,

Rodney Newton, petitioner's co-defendant, pled guilty and testified that Mapes approached him with the idea of burglarizing Chaps. Tr. 2311-17. Mapes told Newton that he needed the money. Tr. 2328. Mapes had a shotgun. Tr. 2349-52. During the burglary, Mapes gave the orders and shot the victim. Tr. 2354-56. When they returned to Mapes' apartment, Mapes put shotgun shells down the drain, and cleansed himself with grapefruit, saying that it removed evidence of firing the gun. Tr. 2364, 2370-73.

Other witnesses implicated Mapes. Hiawatha Mapes, wife of David Mapes and the only defense witness, admitted that Mapes owned a sawed-off shot gun that he carried around in a beige gym bag. Tr. 3484.

Michael Reese testified that Mapes tried to recruit him to rob Chaps weeks before the crime. Tr. 2503-04, 2552-53. After the crime, Mapes told him that Newton's testimony that Mapes shot Allen could hurt him, and that Mapes told him he wished it had not happened that way and wished the victim had not made that move. Mapes also told him what he and Newton did after the robbery. Tr. 2518-28.

Christine Alexander testified that Mapes brought a bag containing a gun up to her apartment, and that he and others were discussing committing a robbery. Tr. 2752-58.

Hayward Chambers testified that Mapes had a bag with a shotgun in it, and that Mapes had told him he was going to get money out of video games at Chaps. Tr. 2793-95. After the crime, Mapes talked about getting rid of some shells, and said he had gotten into trouble and needed to leave town. Tr. 2805-07. Mapes told him that "a man lift his head up and he dropped him." Tr. 2808-09, 2812. Mapes said that if he had known Newton was scared held have killed him too, Tr. 2813, and that if anyone talked and he found out, "they'd get the same." Tr. 2816. John Clark, Mapes, landlord, testified

that Mapes called him and learned that the police had found shot gun shells under Mapes' floor. Tr. 2869-71.

Police officers provided further evidence against Mapes. Detective Kunz testified that a pry bar or crowbar and screwdrivers were found at Mapes' apartment. Tr. 2948-50. The prybar was established by Detective Sergeant Reynolds, from its markings, as the tool used in the crime. Tr. 3353-54. The officers found shotgun shells underneath Mapes' floor, Tr. 3138-47, which were established by Detective Reynolds to be the same type, gauge and weight as that used to kill Allen. Tr. 3349-51.

Mapes made inconsistent and uncorroborated statements to the police regarding his involvement. He first denied that he owned a shotgun and that he was not in town when the crime was committed. Tr. 3134-35. After he learned he had been seen in town the day of the robbery, and that the officers had found shells under his floor, he stated that he did own a shotgun, that he fired it on New Year's Eve, and that his cat had knocked the shells down the drain. Tr. 3149-52, 2974-75. Mapes also admitted to some involvement in the crime, stating that he, Chambers, Newton, and an individual named "Red" had planned on burglarizing Chaps, but Chambers did not actually participate. Mapes said that Newton and "Red" entered Chaps while he acted as a lookout, and that he didn't learn there was a murder until later. Tr. 2975; 3263-65. Mapes described this individual named "Red," but the police could find no evidence that any such person existed. Tr. 2980-82. Mapes' statement as to where and from whom he got the shotgun did not check out upon further investigation. Tr. 2981-83.

Mapes did not testify at the guilt phase. Only one witness, his wife, testified for the defense (Tr. 3442-3500). Her testimony was not appreciably helpful to petitioner's case.

Since the conviction was based on strong evidence, the probability that any alleged error of counsel was prejudicial is greatly reduced.

> Petitioner alleges four counsel errors occurred during the guilt phase (grounds titled 1(A) through 1(D) by petitioner).

Ground 1(A) alleges that counsel failed to properly investigate before trial. Petitioner does not claim or identify any exculpatory evidence which would have been unearthed.

Ground 1(B) claims that counsel failed to raise and preserve substantive issues through proper motions practice, and incompetently handled those he did make. Petitioner does not-identify most of the motions he claims should have been filed, much less show they would have been meritorious and what impact they would have had if granted. Similar observations apply to motions that were made.

Ground 1(C) claims that counsel was incompetent during *voir dire*. As noted in section II.A, *supra*, the *voir dire* was constitutional. Petitioner's contention that the prospective jurors were confused by counsel and the court is not supported by the cited portions of the transcript, nor by the record as a whole. The trial court gave a reasonable explanation to the jury of the guilt and sentencing phases of the trial and the jury's role therein.

Ground 1(D) claims that counsel's trial strategy was insufficient, he was rude and abusive, and he failed to object to improper instructions (*e.g.*, that the firearm specification was an "aggravating circumstance") or propose appropriate ones (*e.g.*, a lesser included offense charge).

Petitioner has failed to show that prejudice resulted from counsel's strategy. Petitioner's citations to the record at times are incorrect or reflect the innocuous. Taken together, they fail to show (in all but a few instances which have not been shown to have had an adverse impact) that counsel was rude and abusive, as opposed to disagreeing with the court or counsel.

As to the lesser included offense argument, the evidence leaves no reasonable probability that the outcome would have been different had the jury been presented with a lesser included offense. *See Harris v. United States*, 938 F.2d 882, 883 (8th Cir. 1991).

Petitioner's argument that trial counsel was ineffective because he failed to object to certain jury instructions is without merit for the reasons discussed in section II.F., *infra*.

To summarize, appellate counsel was not ineffective for failing to raise the issue of ineffective assistance of trial counsel at the guilt phase. Petitioner has not established cause and prejudice for his state procedural waiver of this claim.

II.F. Ineffective Assistance of Appellate Counsel (Ground 2)

Petitioner alleges ineffective assistance of appellate counsel in his second ground. There is a constitutional right on direct appeal to effective assistance, *Evitts v. Lucey*, 469 U.S. 387 (1985). Holding an evidentiary hearing on this issue is the exceptional case, *Gray v. Greer* 800 F.2d 644, 647 (7th Cir. 1986), and is not necessary herein.

1. Ineffective Assistance of Trial Counsel

Failure to raise this claim on appeal has been previously discussed and found to be without merit.

2. Jury Instructions

Petitioner contends appellate counsel should have challenged certain instructions on appeal because although not objected to, they constituted plain error. Plain error under Ohio Criminal Rule 53(B) is to be found under exceptional circumstances and "only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St. 2d 91, 97 (1979). An improper instruction does not constitute plain error unless "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Durkin*, 66 Ohio St. 2d 158, 161 (1981).

Analysis of the challenged instructions reveals that they did not constitute plain error nor do they reflect ineffective assistance of counsel.

As noted earlier, petitioner was indicted on two counts of aggravated murder, pursuant to Ohio Revised Code §2903.01(B). Count one charged that the murder occurred during the course of an aggravated robbery Count two charged the murder occurred during the course of an aggravated burglary. Germane to petitioner's claim, each of the two aggravated murder counts had four identical specifications. Three of those specifications were death penalty specifications. The fourth specification was a firearm specification which did not constitute a death penalty specification.

The jury was to consider only two of the death penalty specifications, as well as the gun specification. The death penalty specification charging a prior murder conviction was tried to the judge, pursuant to petitioner's waiver of a jury trial.

The trial court erroneously instructed the jury they would be deliberating on three, rather than two, death penalty specifications of aggravating circumstances, identifying the gun specification as an aggravating circumstance (Tr. 3686-87):

> Now, ladies and gentlemen, if you find the defendant guilty of aggravated murder, I have prepared for your consideration a separate and distinct jury form [*sic*] for each count. I have prepared two for each count. You will use the printed form if you find the defendant guilty of aggravated murder. And it is your duty to then deliberate and further decide the additional factual questions, that is, the three specifications of aggravating circumstances set forth in Count No. I of the indictment the three specifications of aggravating circumstances in Count II of the indictment.

The court subsequently instructed the jury as follows (Tr. 3700-01):

> Now, the State Specification No. 3 in both counts I and II charges that defendant, David Mapes, had "a firearm on or about his person or under his control while committing the offenses charged in Count I and Count II of the indictment," that is aggravated robbery and aggravated burglary.
>
> * * *
>
> If you find that the State of Ohio has proven beyond a reasonable doubt all the essential elements of the aggravating circumstances of Specification No. 3 in both Counts I and II, then your finding must be guilty as to Specifications No. 3 in Counts I and II.

While the trial court incorrectly instructed that the firearm specification charged an aggravating circumstance, petitioner has failed to show that petitioner was prejudiced. The jury found petitioner not guilty of the two death penalty specifications it considered. Finding petitioner guilty of the gun specification did not change the outcome of the guilt phase.

Petitioner also contends the instructions on distinguishing between whether petitioner was the principal offender, as opposed to an accomplice, in the context of the aggravating circumstances, constituted plain error. After instructing the jury on the elements of aggravated murder, the judge turned to death specification Nos. 1 and 2. He informed the jury that it had to consider two issues, "Your first issue is to decide whether or not David Mapes is the principal offender or whether he was an accomplice or an aider and abettor." (Tr. 3689) Petitioner objects to the following instructions concerning this issue (Tr. 3690):

> If you find beyond a reasonable doubt that David Mapes was not the principal offender, then you would consider whether or not David Mapes was an accomplice or an aider and abettor only.

This instruction dealt with specification No. 1. The court gave essentially the same instruction concerning specification No. 2 (Tr. 3696).

Petitioner contends these instructions constituted a due process violation in that they required the jury to find defendant was not the principal offender beyond a reasonable doubt before deliberating on whether he was an accomplice. Since the jury found petitioner was not guilty of specifications 1 and 2, petitioner has not established either

plain error or prejudice, even assuming the instructions were erroneous.

Petitioner also contends that counsel was ineffective on direct appeal for failing to raise the claim of trial judge bias. This issue has previously been discussed in section II.D., *supra*. That discussion is applicable to the ineffective assistance claim in the context of Ohio law.

Petitioner contends inadequate briefing of two claims made on appeal. This claim is without merit.

In summary, petitioner has failed to show ineffective assistance of appellate counsel with reference to issues petitioner claims existed during the guilt phase which should have been, but were not, raised on appeal.

II.G. Prosecutorial Misconduct (Ground 13)

Petitioner concedes he waived this issue, section I.B., *supra*.

II.H. Inconsistent Jury Verdicts (Ground 12)

Petitioner asserts that the jury verdicts on counts one and two, finding defendant guilty of aggravated murder but not guilty of the specifications, are inherently inconsistent, which renders the death penalty a violation of the Eighth Amendment. It was noted previously, section I.B., *supra*, that this issue was waived.

II.I. Limiting the Evidence (Ground 9)

The guilt phase was bifurcated between a jury trial and a non-jury trial. Petitioner waived a jury trial on one of the death penalty specifications, specification 4, which charged

that petitioner had previously been convicted of a murder, of which an essential element was the purposeful killing of another. The judge heard the evidence on specification 4 after the jury returned its guilty verdict, and ruled that the state had proved the specification beyond a reasonable doubt. Thus, petitioner became eligible for the death penalty under Ohio Revised Code §2929.04(A)(5). Petitioner raises two issues in relation to the judge's verdict.

The prior murder conviction specification was based on the evidence that showed that approximately eleven years previously, on May 31, 1972, petitioner pled *non vult* to a charge of murder in the State of New Jersey. Petitioner contends the trial court constitutionally erred in refusing to permit extrinsic evidence regarding petitioner's *non vult* plea. He contends that under *State v. Ramseur*, 106 N.J. 123, 524 A.2d 188 (1987) , a conviction on a *non vult* plea is subject to a motion to strike for unreliability.

Ramseur holds that a defendant can attack the reliability of a prior conviction based upon a *non vult* plea, but only under certain limited circumstances:

> We therefore will allow, under limited circumstances, an attack on a conviction resulting from such a *non vult* plea. We limit those circumstances to the situation in which the *non vult* plea was entered at a time when its acceptance eliminated the possibility of a death sentence, and in which the record - usually of the proceedings at the time of the plea - suggests a realistic possibility that defendant did not commit murder. For instance, in this very case the *non vult* plea insulated defendant from the death penalty, and the plea proceedings, including defendant's statement of his version of the homicide, suggested the possibility of manslaughter. Under those circumstances, the trial court, upon

> motion by the defense, should conduct a preliminary hearing ... concerning the reliability of the prior conviction.

Id. at 278-79, 524 A.2d at 266.

Petitioner contends the trial court should have allowed him to present evidence as to the reliability of his plea because he received a sentence more appropriate to a manslaughter conviction than a murder conviction. SAP at 87. However, *Ramseur* requires two criteria. The second criterion requires that petitioner entered his *non vult* plea when its acceptance eliminated the possibility of a death sentence. He cannot prove this second criterion.

At the time petitioner entered his *non vult* plea in May of 1972, the death penalty statute in New Jersey had been declared unconstitutional on January 17, 1972 in *State v. Funicello*, 60 N.J. 60, 286 A.2d 55, *cert. denied sub nom., New Jersey v. Presha*, 408 U.S. 942 (1972). *Funicello* not only held the New Jersey death penalty statute unconstitutional, it also ruled the maximum sentence for murder in the first degree was life imprisonment. From January 17, 1972 to 1982, when a new death penalty statute was passed, New Jersey had no death penalty provision. See *State v. Davis*, 116 N.J. 341, 371-72, 561 A.2d 1082, 1097 (1989); *Ramseur*, at 203.

Since petitioner's *non vult* plea in 1972 did not eliminate the possibility of a death sentence, he was not entitled to contest the reliability of that plea in 1983. *See State v. Coyle*, 119 N.J. 194, 238, 574 A.2d 951, 973 (1990) ("[T]he jury can consider [defendant's] 1974 *non vult* plea to murder [as] an aggravating factor... [T]here can be little doubt about the reliability of [defendant's *non vult*] plea. Defendant did not enter the plea to insulate himself from a possible death

sentence, because the capital-punishment statute was not on the books at that time.")

II.J. Improper Reliance Upon Prior *Non Vult* Plea (Ground 10)

Petitioner contends that the trial court's use of the *non vult* plea as proof of the specification was contrary to Ohio Rule of Evidence 410 and Rule 11(b)(2) of the Ohio Rules of Criminal Procedure, thus he was denied due process and equal protection of the law.

To the extent petitioner seeks relief based on a violation of state law he has not stated a cognizable federal habeas corpus claim, since habeas claims must be based on the "Constitution, laws or treaties of the United States, 28 U.S.C. Section 2241." *Rose v. Hodges*, 423 U.S. 19, 21 (1975). Federal courts must defer to the state court's interpretation of its own rules, and not "act as an additional state appellate court to review a state court's interpretation of its own law or procedure." *Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988), *cert. denied*, 488 U.S. 1011 (1989).

Assuming there was a state evidentiary rule violation, the Sixth Circuit has said:

> Our review of state court evidentiary rulings is extremely limited. "[E]rrors in the application of state law, especially rulings regarding the admission or exclusion of evidence, are usually not to be questioned in a federal habeas corpus proceeding." *Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988); *see also Lundy v. Campbell*, 888 F.2d 467, 469-70 (6th Cir. 1989) (deference should be accorded state court determinations of whether due process was denied by trial errors), *cert. denied*, 110 S.Ct. 2212 (1990). Such errors will result in the granting of a writ of habeas

> corpus only if they result "in the denial of fundamental fairness, thereby violating due process." *Cooper, supra*, 837 F.2d at 286.

Waters v. Kassulke, 916 F.2d 329, 335 (6th Cir. 1990). In making the determination whether any errors are fundamentally unfair, the "errors are to be considered 'within the context of the entire record.'" *Id.*, quoting *Payne v. Janasz*, 711 F.2d 1305, 1310 (6th Cir.) *cert. denied*, (1983).

On direct appeal in this case, the Ohio Supreme Court found no violation of its procedural and evidentiary rules. *State v. Mapes*, 19 Ohio St. 3d at 111-12 (1985):

> Crim. R. 11(B)(2) and Evid. R. 410 prohibit only the admission of a no contest plea. These rules do not prohibit the admission of a conviction entered upon that plea when such conviction is made relevant by statute. The trial court was correct in admitting the evidence of the prior conviction as it was not equivalent to the admission of the no contest plea and it was not introduced by the prosecution for any purpose other than establishing the specification. The purpose of Evid. R. 410 as it relates to criminal trials is to encourage and protect certain statements made in connection with plea bargaining and to protect the traditional characteristic of the no contest plea which is avoiding the admission of guilt that is inherent in pleas of guilty. See 1 Weissenberger, Ohio Evidence (1985) 55, Section 410.1 and Advisory Committee Notes to Fed. R. Evid. 410. These purposes are not disserved by the admission of a conviction entered upon a no contest plea.
>
> The issue of the applicability of Evid. R. 410 and Crim. R. 11(B)(2) aside, we note that the United States Supreme Court has authorized admission of

prior convictions and pleas of no contest in death penalty cases, *Gregg v. Georgia* (1976), 428 U.S. 153, and the majority rule that convictions entered on pleas of no contest are admissible to establish enhanced penalties. See Annotation (1963), 89 A.L.R. 2d 540, 610. Thus, we hold that Crim. R. 11(B)(2) and Evid. R. 410 do not preclude admission of a conviction entered upon a no contest plea to prove a prior murder specification under R.C. §2929.04(A)(5). Petitioner's claim of a due process violation is not well taken.

Summary

None of the grounds relating to the guilt phase are well taken. The petition should be denied as to the conviction of aggravated murder.

III. The Sentencing Phase
A. Same Jury for Both Phases (Ground 11)

Petitioner challenges the constitutionality of Ohio Revised Code §2929.03, which calls for a unitary jury, i.e., the same jury hears the guilt phase and, if necessary, the sentencing phase. Petitioner contends that since the jury was death-qualified, it was more likely to convict and be punitive in the sentencing phase, which violated rights to due process, a fair and impartial jury, effective assistance of counsel, equal protection, and an arbitrary and capricious imposition of death.

The Supreme Court has upheld unitary death qualified juries. *Lockhart v. McCree*, 476 U.S. 162 (1986); *see also Buchanan v. Kentucky*, 483 U.S. 402 (1987) The state has a significant interest in a scheme wherein the same jury is used for the guilt and penalty phases of a trial. *Buchanan*, 483 U.S. at 419, citing *Lockhart*, 476 U.S. at 182. Finally, the

Court noted that death qualification was necessary to constitute a jury that could find the facts and apply the law at both the guilt and sentencing phases. *Buchanan*, 483 U.S. at 415. The Court stated in *Lockhart:*

> [T]he removal for cause of "*Witherspoon*-excludables" serves the state's entirely proper interest in obtaining a single jury that could impartially decide all of the issues.... We have upheld against constitutional attack the Georgia capital sentencing plan which provided that the same jury must sit in both phases of a bifurcated capital murder trial, *Gregg v. Georgia*, 428 U.S. 153, 158, 160, 163 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), and since then have observed that we are "unwilling to say that there is any one right way for a State to set up its capital sentencing-scheme." *Spaziano, v. Florida*, 468 U.S. 447, 464 (1984).
>
> * * *
>
> Another interest identified by the State in support of its system of unitary juries is the possibility that, in at least some capital cases, the defendant might benefit at the sentencing phase of the trial from the jury's "residual doubts" about the evidence presented at the guilt phase.... Finally, it seems obvious to us that in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase; if two different juries were to be required, such testimony would have to be presented twice, once to each jury. As the Arkansas Supreme Court has noted, "[s]uch repetitive trials could not be consistently fair to the State and perhaps not even to the accused." *Rector, supra*, at 396, 659 S.W.2d, at 173.

476 U.S. at 180-81.

Petitioner's claim that O.R.C. §2929.03 is unconstitutional is without merit.

III.B. Ineffective Assistance of Trial Counsel (Ground 1)

Petitioner's claim of ineffective assistance of trial counsel must be considered in the context of whether appellate counsel was ineffective in not raising the issue on appeal, thus constituting cause for the state procedural waiver of this claim. See section I.B., *supra*.

Petitioner asserts counsel failed to adequately investigate and prepare mitigation evidence. In support, he submits three affidavits, one from an attorney and two from mitigation specialists (petitioner's appendix, PA, 12, 16). Their affidavits do not submit evidence, as opposed to allegations, that trial counsel was ineffective. The affidavits also do not demonstrate prejudice.

The Balske affidavit (PA 12) states counsel failed to investigate petitioner's life history which allegedly would have allowed counsel to "present persuasive mitigating evidence" (*id.*, ¶11.b), and counsel failed to "present mitigating evidence" (*id.*, ¶11.d.). This affidavit assumes, but does not demonstrate, that there was mitigating evidence.

The Schorr affidavit (PA 16a) states counsel failed to "develop completely the defendant's life history" (*id.*, ¶7). Moreover, "based on my own independent investigation," information concerning petitioner "exists which could have served as a basis for a productive mitigation" (*id.*, ¶15). The alleged mitigation evidence is not set forth.

The Core affidavit (PA 16b) states that counsel failed to collect the necessary records or conduct the necessary

interviews to develop a life history and "strategy for mitigation...." (*Id.*, ¶¶5, 6) This affidavit fails to demonstrate there was evidence in existence which would have produced a strategy superior to that utilized by counsel.

The conclusory allegations of the affidavits are insufficient to show a hearing is necessary, *see Pagan*, 984 F.2d at 64.

Petitioner asserts counsel inadequately researched the circumstances of his prior New Jersey murder conviction, thus did not present and develop evidence that Mapes had not been the triggerman. At the sentencing trial, petitioner submitted his unsworn testimony that he was not the triggerman in the New Jersey murder (Tr. 4051-57). The prosecution rebutted with the sworn testimony of Rodney Newton, petitioner's co-defendant, who stated that Mapes told him in 1983 that he was the triggerman (Tr. 4083).

Any additional evidence that counsel should have presented concerning who was the New Jersey triggerman became irrelevant when the trial court foreclosed the jury from considering it as mitigation, with this instruction:[3]

> **The mitigating factors do not apply to the prior murder conviction at all.** I might say that this is the aggravating circumstances that he was found guilty of when he waived the jury to me. And you are here to compare any mitigating circumstances that you find in this case with that aggravating circumstance.

Tr. 4216-17 (emphasis supplied). Thus, no prejudice resulted from counsel's alleged failure to investigate and develop

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[3] The constitutionality of this instruction is considered in section III.D., *infra*.

evidence relating to whether petitioner was the triggerman in the New Jersey homicide.[4]

Petitioner's remaining arguments need only be briefly mentioned. The jury was not misled or misinstructed in the sentencing phase as to the function of the firearm specification or the number of aggravating circumstances, thus counsel was not ineffective for failing to make an objection. See section III.C., *infra*. The jury was not misinstructed as to their verdict being a recommendation. *Id.* The jury was not given an acquittal-first jury instruction as to whether to recommend the death penalty or impose a life sentence. *Id.* The fact that lead counsel was representing another client in another case does not, in and of itself, show his representation of Mapes was ineffective.

Petitioner has not shown that trial counsel was ineffective at the sentencing phase, thus has not shown that appellate counsel was ineffective in failing to raise this issue on direct appeal. Accordingly, petitioner has not shown cause or prejudice to excuse the state procedural waiver of this claim.

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[4] New counsel has proffered affidavit evidence, some of it of doubtful admissibility, obtained in early 1987, that Mapes was not the New Jersey triggerman. Petitioner's two co-defendants in the New Jersey murder signed affidavits identifying co-defendant Hampton as the triggerman in the New Jersey murder (PA 18, 19). Newton, petitioner's co-defendant in the case *sub judice*, signed an affidavit recanting his triggerman testimony at the sentencing trial (PA 17). Three New Jersey police officers signed affidavits that the relevant New Jersey police report "indicates" Hampton was the triggerman. The police report was not attached (PA 20a, 20b, 21). Petitioner has not shown whether due diligence in 1983 would have obtained this evidence. Certainly Newton's recantation would have been doubtful.

III.C. Jurors' Diminished Sense of Responsibility (Ground 3)

As noted earlier, Section I.B., *supra*, ground 3 is waived unless cause and prejudice is established. Thus, petitioner must establish ineffective assistance of appellate counsel for not raising this claim.

Petitioner alleges that statements made to the jury by the court and counsel misinformed them and diminished their sense of responsibility, in violation of the Fifth, Eighth, and Fourteenth Amendments. Specifically, petitioner contends that constitutional violations arose because: (1) the trial judge repeatedly told the jury their sentencing verdict was only a recommendation; (2) the trial judge led the jury to believe the gun specification was an aggravating circumstance; (3) the jury was given an "acquittal first" jury instruction relative to their sentencing recommendation and (4) the trial judge and prosecutor attempted to impress on the jury that they had no discretion in making their sentencing recommendation. These claims are without merit, thus appellate counsel was not ineffective for failing to raise them.

Mapes' counsel did not object to many instructions during trial. Under Ohio law, the failure to object to a jury instruction is a waiver of that claim of error upon appeal, unless the improper jury instruction was a "plain error," such that but for the error the outcome of the trial clearly would have been otherwise. *State v. Underwood*, 3 Ohio St. 3d 12, 13 (1983). Thus, unless the alleged improper instructions were "plain error," appellate counsel was barred from raising the issue and was not ineffective.

Petitioner contends that advising the jury that any verdict to impose the death penalty would only be a recommendation

was plain error, relying on *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In that case, the Supreme Court found it impermissible to suggest to a jury that the appellate court would review its decision and thus bore the responsibility for determining the appropriateness of the death penalty. Unlike the Mississippi statute in that case, the Ohio statute provides that if the jury determines the aggravating circumstances outweigh the mitigating factors, it "shall recommend to the court that the sentence of death be imposed on the offender." Ohio Revised Code §2929.03(D)(2). The court then independently reviews the evidence, and if the aggravating circumstances outweigh the mitigating factors, the court imposes the death sentence. Ohio Revised Code §2929.03(D)(3). If, however, the jury finds that the mitigating factors outweigh the aggravating circumstances, it must recommend a life sentence,, which is binding upon the court. Ohio Revised Code §2929.03(D).

The jury was correctly advised of this Ohio law on two separate occasions. Tr. 503-04, 4183-85. Since under Ohio law the jury does in fact only recommend the death penalty, there was no *Caldwell* violation. *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1101 (6th Cir. 1990), *cert. denied sub nom., Scroggy v. Kordenbrock*, 499 U.S. 970 (1991) (applying Kentucky law) (In order to make out a *Caldwell* violation, there must be some affirmative misstatement misleading the jury as to its role; emphasizing that the jury is only making a "recommendation" to the judge is not sufficient.)[5] There was no misstatement of the jury's role.

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[5] Petitioner relies in part on *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986), which found a *Caldwell* violation where the judge told the jury repeatedly during *voir dire* that their verdict was only a recommendation, and that he, the judge, made the final decision. That was found to be a mischaracterization of Florida law because the Jury's sentence may only be rejected by the judge if the facts are

Petitioner contends the trial court treated the firearm specification as an aggravating circumstance and erroneously instructed the jury in accordance therewith. Clearly the court understood during the sentencing phase that the only aggravating circumstance was the prior murder conviction for a purposeful killing, and the jury was instructed accordingly. The judge told the jury the firearm specification was irrelevant to the sentencing phase of the trial. (Tr. 4033) The jury was told repeatedly that the only aggravating circumstance to be weighed against any mitigating evidence they found was the prior conviction for a purposeful killing. Tr. 4045, 4057, 4131-33, 4149-50, 4172-74, 4178, 4180-81, 4227-28. There is no indication the jury might have believed that the gun specification was an aggravating circumstance to be weighed during the sentencing phase.

Petitioner contends that the court used an improper "acquittal-first" jury instruction when it instructed:

> Now, as I have indicated, if all twelve jurors find by proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, that is the aggravating circumstances which he was found guilty, Specification 4 in each count, then you must return a finding to the Court.
>
> I instruct you, as a matter of law, that if you make such finding then you have no choice and must recommend to the Court that the sentence of death be imposed on the defendant, David Mapes.

"so clear and convincing that virtually no reasonable person could differ." *Id.* at 1529. Thus, under those circumstances, the crucial role of the jury was diluted. There was no dilution of the jury's role in this case.

* * *

> On the other hand, if after considering all of the relevant evidence raised at trial the testimony, the other evidence, the unsworn statement of David Mapes, the evidence of the State of Ohio, and the arguments of counsel, you find that the State of Ohio failed to prove that the aggravating circumstances which the defendant, David Mapes, was found guilty of committing outweigh the mitigating factors, then you will return your verdict reflecting your decision. That is, you must unanimously find that the State has failed to prove beyond a reasonable doubt that the aggravating circumstances of which the defendant was found guilty of committing outweigh the mitigating factors. In this event you will then proceed to determine which of two possible imprisonment sentences to recommend to the Court. Your recommendation to the Court shall be one of the following:
>
> > (1) That David Mapes be sentenced to life imprisonment with parole eligibility after 30 full years of imprisonment, or
> >
> > (2) That David Mapes be sentenced to life imprisonment with parole eligibility after 20 full years of imprisonment. Tr. 4183-85.

Petitioner contends this instruction was an illegal "acquittal first" instruction under Ohio law, since it required the jury to "ballot first on the question of death and reach a unanimous verdict in favor of petitioner before they could even begin deliberating on either of the life verdicts." Traverse at 27. He quotes the following from *State v. Thomas*, 40 Ohio St. 3d 213 (1988), *cert. denied*, 493 U.S. 826 (1989) (paragraph 3 of syllabus):

> A jury must unanimously agree that the defendant is guilty of a particular offense before returning a verdict of guilty on that offense. If a jury is unable to agree unanimously that a defendant is guilty of a particular offense, it may proceed to consider a lesser included offense upon which evidence has been presented. The jury is not required to determine unanimously that the defendant is not guilty of the crime charged before it may consider a lesser included offense.

Thomas suggested juries be instructed that if they are unable to agree upon a charge, they begin considering the lesser included offense. *Id.* at 220-21.

Guilt and death eligibility had already been decided in Mapes' case. The jury had only one issue left to decide: whether the mitigating factors outweighed the aggravating circumstance of a prior murder conviction. In the lesser included offense context, the jury has at least two issues: (1) whether defendant is guilty of the charged offense, and (2) whether defendant is guilty of the lesser included offense. *Thomas* does not apply. Petitioner's claim is not well taken.

Petitioner contends that the trial judge and prosecutor attempted to impress on the jurors that they had no discretion in making their sentencing recommendation, citing Tr. 4183. The court instructed the jury:

> Now, as I have indicated, if all twelve jurors find by proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, that is the aggravating circumstances which he was found guilty, Specification 4 in each count, then you must return a finding to the Court.

> I instruct you, as a matter of law, that if you make such finding then you have no choice and must recommend to the Court that the sentence of death be imposed on the defendant, David Mapes.

Tr. 4183. This is an accurate statement of the law under Ohio Revised Code §2929.03(D)(2).

These instructions were not plain error. Petitioner has not shown cause and prejudice for the state procedural default.

III.D. Ineffective Assistance of Appellate Counsel (Ground 2)

Petitioner raises claims of ineffective assistance of appellate counsel, one of which is well taken.

1. Precluding Mitigating Factors

Petitioner asserts one meritorious claim, that counsel was ineffective in failing to raise on appeal the issue that the following instruction during the sentencing phase was unconstitutional:

> **The mitigating factors do not apply to the prior murder conviction at all.** I might say that this is the aggravating circumstances that he was found guilty of when he waived the jury to me. And you are here to compare any mitigating circumstances that you find in this case with that aggravating circumstance.

(Emphasis supplied.) Tr. 4216-17. Petitioner's counsel objected to this instruction (Tr. 4212-4214).

It is reasonably probable that the underlined portion of the quoted instruction deprived petitioner of a constitutional right. In *Eddings v. Oklahoma*, 455 U.S. 104 (1981), the

Supreme Court held that the Eighth Amendment requires consideration of the character and record of the accused as being constitutionally indispensable to the process of inflicting the death penalty. *Eddings* noted that prior law "recognizes that 'justice ... requires ... that there be taken into account the ... character and propensities of the offender.'" *Id.* at p. 112. *Eddings* explicitly adopted the plurality opinion in *Lockett v. Ohio*, 438 U.S. 586 (1978), which stated the rule as follows:

> [W]e conclude that the Eighth and Fourteenth Amendments require the sentencer ... not be precluded from considering, **as a mitigating factor,** any aspect of a defendant's character or record..that the defendant proffers as a basis for a sentence less than death.

Id. at 604 (emphasis in original).

The Supreme Court applied this principle to a fact situation similar to the case *sub judice*, in *Sumner v. Schuman*, 483 U.S. 66 (1987). In 1958, Schuman had been convicted of first degree murder and sentenced to life imprisonment without the possibility of parole. In 1975, while serving his sentence, he was convicted of capital murder for killing a fellow inmate. Nevada law mandated that he be sentenced to death by reason of his prior conviction, irregardless of the circumstances surrounding the prior conviction.

Sumner applied *Lockett* and *Eddings*, and held "that the Eighth and Fourteenth Amendments require that the sentencing authorities be permitted to consider any relevant mitigating evidence before imposing a death sentence." *Id.* at p.76. The mere fact Schuman was serving a sentence of life in prison without possibility of parole "does not specify for what offense the inmate received a life sentence nor does

it permit consideration of the circumstances surrounding that offense or the degree of the inmate's participation." *Id.* at 80. The Court further noted, at 81:

> Past convictions of other criminal offenses can be considered as a valid aggravating factor in determining whether a defendant deserves to be sentenced to death for a later murder, but the inferences to be drawn concerning an inmate's character and moral culpability may vary depending on the nature of the past offense. The circumstances surrounding any past offense may vary widely as well. Without consideration of the nature of the predicate life-term offense and the circumstances surrounding the commission of that offense, the label "life-term inmate" reveals little about the inmate's record or character. **Even if the offense was first-degree murder, whether the defendant was the Primary force in that incident, or a nontriggerman like Schuman, may be relevant to both his criminal record and-his character** [emphasis supplied].

Thus, the Eighth and Fourteenth Amendments required that the jury be permitted to consider any evidence regarding the details of Mapes' New Jersey conviction. When the court instructed the jury that "[t]he mitigating factors do not apply to the prior murder conviction at all," it erroneously ruled as a matter of law that the jury could not consider the mitigating claims of petitioner's youth, that he was not the triggerman, and that his sentence was the equivalent of a manslaughter conviction rather than a murder conviction (Tr. 4050-51).

As a general rule, errors in instructions of a trial court to a jury in a state criminal trial are not reviewable in federal habeas corpus proceedings. They are not constitutional errors unless they are so fundamentally unfair as to deprive

petitioner of a fair trial and to due process of law. Undesirable, erroneous or even universally condemned instructions may survive due process scrutiny. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Long v. Smith*, 663 F.2d 18 (6th Cir. 1981), *cert. denied*, 455 U.S. 1024 (1982). In reviewing state court instructions on a claim of constitutional error, the alleged unconstitutional language must be considered within the context of overall instructions, *Cupp v. Naughten*, 414 U.S. 141 (1973). An omission, or incomplete instruction, is less likely to violate due process than is a misstatement of law, *O'Guin v. Foltz*, 715 F.2d 397, 399 (6th Cir. 1983). Placing the erroneous instruction in context reveals the following.

Before trial began on the sentencing phase, the court preliminarily instructed the jury as to the appropriate law, including the mitigating factors set forth in Ohio Revised Code §2929.04(B)(1) through (7). (Tr. 4031-35) The seventh factor broadly permitted the jury to consider "any other factors that are relevant to the issue of whether the offender should be sentenced to death." (Tr. 4035) The court also informed the jury (Tr. 4035):

> The law provides that the offender be given great latitude in the presentation of evidence of the factors listed that I have just read to you, listed above, and any other factors in mitigation of the imposition of the sentence of death.

Petitioner submitted the following evidence through an unsworn statement to the jury (Tr. 4050-51):

> I was arrested in 1972 for a homicide case where a man was shot in his place of business by another man.... There was no robbery involved in it and from what I did, I understand that he had an argument previous to that. I wasn't there during the time that the

argument happened, but I was there during the time that the man was shot, and because of that I was convicted of murder, but the county prosecutor allowed me to plead to a *non vult* so that I could get a sentence of eight to ten years, which is a manslaughter. But I had to cop out to a *non vult* to the indictment of murder.

That is why it still stands that in '72 I was convicted of murder instead of manslaughter.

I was 18 at the time and I had turned 18 three weeks prior to the incident. I was not the trigger man nor did I have a gun in my possession at that time. And I regret the fact that it happened as well as this, too.

I had no control over either circumstances. That is all I have to say.

Petitioner supplemented that statement a short while -later (Tr. 4065-66):

Q. Mr. Mapes, did you request of me [defense counsel] to make a motion to the Court on May 11, 1983, before the Jury heard any testimony?

Mr.Nugent (prosecutor]: Objection.

A. Yes.

Q. You did?

A. Yes.

Q. And will you tell the jury what that request, through the motion, was to the Court in chambers?

A. I requested that I be sentenced to life imprisonment without parole.

Q. What was the basis of that motion?

A. To have the jury not go through the trial.

Following the evidence, the court gave final instructions to the jury prior to deliberations (Tr. 4172-80). The court again set forth the seven mitigating statutory factors found in section §2929.04(B). (Tr. 4179-80) The court also instructed (Tr. 4180):

> You will be called upon to decide the factual question as to whether or not the defendant in the original trial and in this hearing, in the first phase, produced evidence as to any one of those statutory factors that I have just read to you or any other non-statutory factor, that is whether the defendant has met the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death.

After deliberating for a period of time, the jury submitted two questions to the judge. He responded to those questions in open court as follows (Tr. 4216-17):

Now, as to the first question, which reads as follows:

> Are we [the jury] just to consider evidence presented to us in the sentencing hearing or testimony and evidence from both the trial and sentencing hearing as regarding the mitigating factors?

Of course, this is the fourth time I have explained this orally to you. If you find from all the evidence at the sentencing hearing and at the trial that the defendant has gone forward with some evidence of mitigation, and you find that the evidence exists as to the mitigation, then you are to consider it.

The next question reads:

Does the 7 mitigating factors as it applies to SPEC 4 cover this case and the prior conviction?

I have at least three times explained this to you.. You are required to accept without reservation the fact that the defendant was convicted in 1972 of murder. And an essential element of which was the purposeful killing of another.

The mitigating factors do not apply to the prior murder conviction at all. I might say that this is the aggravating circumstances that he was found guilty of when he waived the jury to me.. And you are here to compare any mitigating circumstances that you find in this case with that aggravating circumstance [emphasis supplied].

After further deliberations, the jury submitted two additional questions to the court. The court instructed, in part, as follows (Tr. 4326):

This means that the defendant, at this particular hearing has to produce evidence, some evidence of mitigating factors. If the defendant doesn't produce any evidence and the only evidence you have from the defendant is the statement of the defendant, and if you find mitigating factors, fine, and if you don't, you don't have any mitigating factors.

The jury resumed deliberations, then submitted one further question. It requested a copy of petitioner's prior statement. The statement (4050-51, 4065-66) was read to the jury. (Tr. 4233-36)

Placing the erroneous instructions in context with all of the instructions shows that initially the trial judge gave the jury wide latitude in considering mitigating evidence and factors. However, it appears from the jury question which gave rise to the erroneous supplemental instruction that the jury did not know, despite the wide latitude given to it, the circumstances surrounding the prior New Jersey conviction were to be considered in terms of mitigation.[6]

The court's response that the "mitigating factors do not apply to the prior murder conviction at all" instructed the Jury as a matter of law they were precluded from considering the circumstances surrounding the prior conviction. This meant, among other exclusions, the jury could not consider petitioner's age (three weeks past his 18th birthday) when he committed the murder, .could not consider whether he was the triggerman, and could not consider whether the sentence, hence the conviction, for murder was really equivalent to one for manslaughter.

Placing the erroneous instruction in context, shows it was emphasized by reason of the specific jury question which gave rise to it. There is a reasonable probability that if counsel had, consistent with petitioner's objection at trial, raised the issue of the erroneous instruction on appeal, the

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[6] Perhaps this was due to counsels' final arguments. The prosecutor argued that whether Mapes was the triggerman in the New Jersey case was not relevant (Tr. 4161-72). Petitioner argued it was a mitigating factor (T. 4132-41).

result of the appeal would have been different. Petitioner is entitled to relief on this ground.

2. Other Errors

Petitioner also contends appellate counsel was ineffective for failing to raise the issue of trial court bias or prejudice under a state standard which is similar to the constitutional standard. This was considered in section II.D., *supra*.

Petitioner's contention that appellate counsel was ineffective for failing to raise the issue of an improper jury poll is considered in section III.E, *infra*.

Petitioner contends that appellate counsel was ineffective in the manner in which grounds 4 and 5 were briefed. Appellate counsel did sufficiently raise the issues before the appellate court. Assuming inadequate briefing, petitioner cannot satisfy the prejudice prong of *Strickland* because, as discussed *infra*, see Sections III.G. and III.H., the grounds are without merit. This claim of ineffective assistance of counsel is without merit.

In summary, petitioner's claim that appellate counsel was ineffective is without merit, except with respect to counsel's failure to raise the issue of the erroneous instruction that precluded the jury from considering the circumstances of petitioner's prior New Jersey conviction.

III. E. Improper Jury Poll (Ground 7)

Petitioner contends that the response of one of the jurors, June Chatman, to the jury polling called into question the unanimity of the death sentence verdict. It will be analyzed in the context of whether ineffective assistance of appellate counsel constituted cause for the state procedural default in failing to raise this claim on appeal. See section I.B., *supra*.

The jury poll is provided for under Rule 31(D) of the Ohio Rules of Criminal Procedure:

> Poll of Jury. When a verdict is returned and before it is accepted the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberation or may be discharged.

See also, Ohio-Revised Code §2845.77.

The trial court read the death recommendation as to each of the two aggravated murder counts (Tr. 4237-38), "We, the jury recommend that the sentence of death be imposed on the defendant, David Mapes." (Tr. 4237-38) The court then polled the jury:

> The Court is going to ask this question as it relates to Count 1 and Count 2 by way of polling the jury. The question I am going to ask you is, is this your verdict, and if it is you say, yes.
>
> Alan B. Srp?
>
> MR. SRP: Yes.
>
> THE COURT: Amie Hayner?
>
> MRS. HAYNER: Yes.
>
> THE COURT: John A. Fawcett?
>
> MR. FAWCETT: Yes, sir.
>
> THE COURT: Dennis Sykora?

MR. SYKORA: Yes.

THE COURT: June Chatman. June Chatman.

MRS. CHATMAN: This is the verdict?

THE COURT: The one that we just read.

MRS. CHATMAN: Yes.

THE COURT: Londell Smith.

MR. SMITH: Yes.

THE COURT: Vicki L. Britting.

MRS. BRITTING: Yes.

THE COURT: James Specian?

MR. SPECIAN: Yes.

THE COURT: Betty Barrish.

MRS. BARRISH: Yes.

THE COURT: Ernest Toth.

MR. TOTH: Yes.

THE COURT: John Watson.

MR. WATSON: Yes.

THE COURT: Mary Buntura.

MRS. BUNTURA: Yes.

THE COURT: The court has polled the jury on Count One and Two.

Is there anything further from the prosecutor?

MR. NUGENT: No, sir.

THE COURT: Anything further for the defendant?

MR. CARLIN: Yes, we would like the jury re-polled, your Honor.

THE COURT: The Court is going to re-poll you as to whether or not this is your verdict, the verdicts that were just read in the courtroom.

Alan B. Srp.

MR. SRP: Yes.

THE COURT: Amie Hayner.

MRS. HAYNER: Yes.

THE COURT: John A. Fawcett?

MR. FAWCETT: Yes.

THE COURT: Dennis Sykora.

MR. SYKORA: Yes.

THE COURT: June Chatman..

MRS. CHATMAN: I have to say yes or no?

THE COURT: Yes, you have to say yes or no. It is yes or no. Did you sign these?

MRS. CHATMAN: I signed them, yes.

MR. CARLIN: Objection, your Honor. Could we ask whether or not these were her verdicts?

THE COURT: Are these your verdicts, Mrs. Chatman?

MRS. CHATMAN: It's to me, it's the State's verdict

THE COURT: Wait a second. Please be seated, Mr. Carlin. Did you sign this verdict?

MRS. CHATMAN: Yes, I did.

THE COURT: Okay.

Londell Smith, please.

MR. CARLIN: Objection, your Honor. It is not whether she signed it, is it her verdict?

THE COURT: Please be seated. It is sufficient for this Court.

Londell Smith, please.

MR. SMITH: Yes.

THE COURT: Vicki L. Britting.

MRS. BRITTING: Yes.

THE COURT: James Specian.

MR. SPECIAN: Yes.

THE COURT: Betty Barrish.

MRS. BARRISH: Yes.

THE COURT: Ernest Toth.

MR. TOTH: Yes.

THE COURT: John Watson.

MR. WATSON: Yes.

THE COURT: Mary Buntura.

MRS. BUNTURA: Yes.

Tr. 4238-4242.

To summarize, in the first poll, juror Chatman clearly and unequivocally said "Yes" to the question. In the second poll, she equivocated.

The Ohio Supreme Court has upheld the acceptance of a verdict where two jurors first indicated in open court dissent from the verdict more strongly than did Mrs. Chatman. *Emmert v. State*, 127 Ohio St. 235, 236-387 (1933), held:

> While undoubtedly the court in this circumstance would have been warranted in sending the jury back to its room for further deliberation, we cannot say that there was error in receiving the verdicts. **Neither of**

these two jurors denied that the verdicts were hers. [Emphasis supplied.] Although both indicated somewhat unsettled states of mind, both, after prolonged discussion in the jury room, had signed the verdicts, and each in open court, after full opportunity to say otherwise, said that the verdicts were still hers. No coercion or undue pressure on the part of the trial judge appears. After discussing this feature of the case, the Court of Appeals said:

> "We have no hesitancy, therefore, in deciding that the trial court rightfully accepted the verdicts upon the completion of the polling, as being the true ascertainment by all the members of the jury of the question submitted for their determination, namely, whether the defendant was or was not guilty.
>
> In this judgement of the Court of Appeals we likewise concur.

This case is similar to *Emmert*. Juror Chatman signed the verdict after prolonged jury deliberation and said it was her verdict. Her answers in the second poll did not deny it was her verdict. The trial judge was present and observed Chatman's demeanor in finding she concurred in the verdict. As in *Emmert*, the court may have been warranted in sending the jury back, but it cannot be said there was error in receiving the verdict.

Insofar as petitioner claims a violation of due process, that claim is without merit. In *Hatcher v. Jackson*, 853 F.2d 212, 212 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989), one juror broke into tears during the jury poll, immediately after stating that it was her verdict: "Yes - I can't go through this, I can't do it, I can't. I can't -." *Hatcher* held that the federal court should defer to the state court's exercise of

discretion in determining that its procedural rules were satisfied and that the Juror had responded affirmatively to the jury poll. The court found there was no due process violation.

Neither prong of the *Strickland* test has been met. It cannot be said that an attorney of reasonable competence would have raised the issue on appeal. If it had been raised, there was not a reasonably probability it would change the outcome of the appeal. Appellate counsel was not ineffective for failing to raise the jury poll issue, thus petitioner has not established cause and prejudice for the state procedural waiver of this claim.

III.F. Death Sentence Based Upon Imputed Intent (Ground 5)

Petitioner contends that his death sentence is unconstitutional because he did not possess "the intent necessary to sustain the aggravated murder conviction," rather it is based on the imputed intent of another. (SAP at p.75) Petitioner relies primarily on *Enmund v. Florida*, 458 U.S. 782 (1982), which held the Eighth Amendment requires that one cannot be sentenced to death "who does not himself kill, attempt to kill, or intend that a killing took place, or that lethal force will be employed," *id.* at 797.[7] The jury found that petitioner had the intent to kill as demonstrated from the following.

The two aggravated murder counts, Counts 1 and 2, alleged in part that petitioner "unlawfully and purposely caused the death of another.... (PA 1) The instructions to the jury stated in part that aggravated murder is the "purposeful killing of another while committing or attempting to commit

---

[7] *Enmund* has been modified by *Tison v. Arizona*, 481 U.S. 137 (1986).

or while fleeing immediately after committing or attempt to commit aggravated robbery in the first count and aggravated burglary in the second count." (Tr. 3675) The jury was instructed that to find petitioner guilty, they had to find, beyond a reasonable doubt, among other elements, "that the killing was done purposely and with specific intent." (Tr. 3676) The court defined "purpose" and "purposely." It instructed that a "[p]urpose to kill is an essential element of the crime of aggravated murder in the first and second counts." *Id.* The court continued (Tr. 3676-77):

> A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendant, David Mapes, a specific intention to kill John Allen while the defendant was committing or attempting to commit or while fleeing immediately after committing or attempting to commit aggravated robbery in the first count.

The court instructed on what constitutes purpose (Tr. 3677):

> Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally, but not accidentally. Purpose and intent mean the same thing here.

The instructions tracked Ohio law, see Ohio Revised Code S2901.22(A). It is evident that the jury found petitioner possessed the intent to kill, which satisfies *Enmund, supra.*

The evidence supported the finding of the jury. As noted in *Mapes,* 19 Ohio St. 3d at 112:

> Unlike *Enmund*, the evidence viewed most favorably to appellant places him at the killing with gun in hand and all the evidence presented supports the finding that the appellant was the triggerman. Further,, unlike *Enmund*, the jury in the instant case found that appellant "unlawfully and purposely caused the death" of Allen.

Petitioner's claim that he only had imputed intent, as opposed to the requisite intent to kill, is not well taken.

III.G. Meaningful Appellate Review (Ground 4)

Petitioner's fourth ground alleges he was denied his right to meaningful appellate review. As noted in section I.B., *infra*, he waived this claim.

Summary

The claims of petitioner concerning the death sentence are, except for one, without merit. One allegation of ineffective assistance of appellate counsel is well taken, i.e., counsel's failure to appeal the erroneous jury instruction, given over trial counsel's objections, that "[t]he mitigating factors do not apply to the prior murder conviction at all.... " The court should grant a writ of habeas corpus unless the state affords Mapes an opportunity to present his appeal to the appropriate Ohio state court, within 90 days, for its consideration, on the merits, of the above issue of ineffective assistance of appellate counsel as if it were properly and timely presented. *See Mayo v. Henderson*, No. 566, 93-2446, 1994 WL 2035 (2nd Cir. Jan. 3, 1994); *see also Evans v. Clarke*, 868 F.2d 267 (8th Cir. 1989).

RECOMMENDATION

It is recommended that the petition for a writ of habeas corpus concerning the conviction of petitioner be denied. It is recommended that the petition for a writ of habeas corpus concerning the death sentence be conditionally granted as noted above.

Dated: Feb. 24, 1994

Jack B. Streepy
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time WAIVES the right to appeal the District Court's order. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

Supreme Court, U.S.
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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

RALPH COYLE, WARDEN,

Petitioner

vs.

DAVID A. MAPES

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME III

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APPENDIX E

Filed: January Term, 1985

The State of Ohio, Appellee, v. Mapes, Appellant

[Cite as State v. Mapes (1985), 19 Ohio St. 3d 108.]

Criminal law – Aggravated murder – Death penalty upheld, when.

Syllabus by the Court.

1. Crim. R. 11(B)(2) and Evid. R. 410 do not preclude admission of a conviction entered upon a no contest plea to prove a prior murder specification under R.C. 2929.04(A)(5).

2. A finding by a jury that an accused "unlawfully and purposefully caused the death" of another is sufficient to withstand challenge under *Enmund v. Florida* (1982), 458 U.S. 782, because R. C. 2903.01(D) requires a finding that the accused intentionally caused the death of another for a conviction of aggravated murder.

3. The determination of whether a voir dire in a capital case should be conducted in sequestration is a matter of discretion within the province of the trial judge.

(No. 84-1885 – Decided August 9, 1985)

APPEAL from the Court of Appeals for Cuyahoga County.

On January 30, 1983 at approximately 7:50 a.m., appellant, David Mapes, and Rodney Newton entered Chap's Bar located on Prospect Avenue in Cleveland, Ohio. The bar was closed, but one of its owners, John Allen, and four

employees were present. Allen, Ronald Rucci and Michael Williams were seated at the bar. John Hovekamp and David Yun were off to the side in a section of the bar known as the "pit area," asleep. A sixth man, Frank Kuhn, was upstairs in the building.

Mapes and Newton gained entrance through the rear of the building and, upon encountering the three men at the bar, Mapes aimed a sawed-off shotgun he was carrying at Rucci's head and instructed all three to put their hands on the bar. Allen began to make some gesture with his hands and Mapes shot him in the face. Allen fell to the floor, mortally wounded. At the sound of the shot, Rucci dove to the floor. Mapes ordered Williams to lie on the floor and then searched the men on the floor, including Allen, for money. Newton went first behind the bar to the cash register, and then proceeded to the video machines. While en route to the video machines, Newton spotted Yun and Hovekamp in the "pit area" and notified Mapes of their presence. Mapes ordered Rucci and Williams to crawl to the "pit area" and stood guard over the four there while Newton broke into the video games with a crowbar.

Mapes and Newton next proceeded to the back of the building where the safe was located and the liquor was stored. The two were not able to open the safe as Allen had been the only one present who knew the combination. The four men then heard a door slam and, after determining it was safe, called the police. Allen was dead when the police arrived at 8:10 a.m. The police found no one at the scene but found a broken window by the parking lot of the Town House Apartments and a garage door held open by a wooden block.

Michael Reese, upon hearing the news accounts of the murder and robbery, notified a Cleveland detective that Mapes had approached him and had attempted to recruit him

for the robbery of Chap's Bar. Reese gave the police a formal written statement to this effect on February 5, 1983. On February 6, the police showed a photo array to John Hovekamp. He selected photos of three individuals whom he thought resembled the gunman. This group included a photo of appellant. On the next day, a warrant for appellant's arrest and a warrant to search his apartment were obtained. This search, conducted on February 8, 1983, revealed, among other things, a crowbar. Appellant was arrested and, when questioned, he told police that he had merely prepared an entrance to the bar, but that Newton and a man named Red had committed the robbery. On February 11, 1983, a lineup was held at which Hovekamp positively identified appellant as the man carrying the shotgun within the premises where the robbery and murder occurred.

Newton was arrested on March 4, 1983 in Akron and was interviewed by Cleveland police on March 7. He gave a full written statement to the police recounting the events at the bar consistent with the accounts of the bar employees and the police investigation. This written statement was introduced at trial and Newton testified at trial. Newton also indicated that appellant had returned to his own apartment and dropped unused shells down a drainpipe and arranged to dispose of the gun. After obtaining a warrant, the police found a shell in the hole indicated by Newton. The shell was the same type that was used to kill Allen.

Rucci positively identified appellant during the trial as the man who shot Allen with the sawed-off shotgun. Hayward Chambers testified at trial that appellant had admitted to him that he had robbed Chaps and killed Allen. Appellant's wife and a neighbor, Christine Alexander, both testified that appellant owned a sawed-off shotgun.

Appellant was indicted for two counts of aggravated murder under R.C. 2903.01(B). One count charged that the

murder occurred during the course of an aggravated robbery. The other count charged that the murder occurred during the course of an aggravated burglary. Each of these counts had four identical specifications as follows: Under R.C. 2929.04(A)(7), one death-penalty specification alleging the offense occurred in the course of an aggravated robbery; under R.C. 2929.04(A)(7), one death-penalty specification alleging the offense occurred in the course of an aggravated burglary; under R.C. 2929.04(A)(5), one death-penalty specification alleging a prior murder conviction; and, under R.C. 2941.141, one firearm specification. In addition to the death-penalty charges, Counts Three, Four and Five each charged aggravated robbery under R.C. 2911.01, and Count Six charged aggravated burglary under R.C. 2911.11.

The jury returned a verdict finding appellant guilty of both counts of aggravated murder under R.C. 2903.01(B), but not guilty of the death-penalty specifications charged under R.C. 2929.04(A)(7). Appellant was found guilty of the firearm specification as well as Counts Four, Five and Six. Appellant was found not guilty of Count Three.

The issue of whether appellant was guilty of the prior murder specification under R.C. 2929.04(A)(5) was tried separately to the court. The court received into evidence an indictment from Passaic County, New Jersey, charging appellant with murder. Also, received was a judgment of conviction entered upon appellant's plea of *non vult*. The court found appellant guilty of the prior murder specification under R.C. 2929.04(A)(5).

At the sentencing phase of trial, appellant made a statement on his own behalf, but presented no other witnesses. The jury returned a recommendation that the death penalty be imposed. The trial court sentenced appellant to death on the two counts of aggravated murder

and to terms of imprisonment on Counts Four, Five and Six, to run consecutively.

The court of appeals merged the conviction for aggravated murder with specifications under Count Two of the indictment with the conviction under Count One because only one homicide occurred. The court of appeals affirmed the judgment of conviction and the various sentences imposed by the trial court.

This cause in now before the court upon an appeal as of right.

John T. Corrigan, prosecuting attorney, and *Timothy J. McGinty*, for appellee.

Paul F. Markstrom and *Daniel Gaul*, for appellant.

WRIGHT, J.

I

In his first proposition of law, appellant argues that the *non vult* plea is equivalent to a no contest plea and, under Crim. R. 11(B)(2) and Evid. R. 410, the New Jersey conviction entered upon a *non vult* pleas is inadmissible to prove a prior murder specification under R.C. 2929.04(A)(5). Crim. R. 11 states in part:

> "(B) Effect of guilty or no contest pleas. With reference to the offense or offenses to which the plea is entered:
>
> "* * *
>
> "(2) The pleas of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment,

information, or complaint and such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding."

Evid. R. 410 states in part:

"Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn or a plea of no contest, or the equivalent pleas from another jurisdiction, * * * is not admissible in any civil or criminal proceeding against the person who made the plea or offer. * * *"

R.C. 2929.04 provides, in part:

"(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment * * * and proved beyond a reasonable doubt:

"* * *

"(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, * * *."

[1] Appellant was convicted of murder by a New Jersey court. An essential element of this crime was the purposeful killing of another. Two investigating officers from New Jersey testified at a proceeding conducted by the trial judge that appellant was convicted of the prior murder. Under New Jersey law, appellant's *non vult* plea to the murder indictment had the effect of insuring that appellant would not receive the death penalty. This *non vult* plea was made pursuant to a statute, the purpose of which was "the humane end that a guilty defendant need not run the gauntlet of a trial on capital

punishment. ***." *State v. Forcella* (1968), 52 N.J. 263, 279, 245 A.2d 181, 189. Thus we find that the admission of the prior conviction did not violate Crim. R. 11(B)(2) or Evid. R. 410.

Crim. R. 11(B)(2) or Evid. R. 410 prohibit only the admission of a no contest plea. These rules do not prohibit the admission or a conviction entered upon that pleas when such conviction is made relevant by statute. The trial court was correct in admitting the evidence of the prior conviction as it was not equivalent to the admission of the no contest plea and it was not introduced by the prosecution for any purpose other than establishing the specification. The purpose of Evid. R. 410 as it relates to trials is to encourage and protect certain statements made in connection with plea bargaining and to protect the traditional characteristic of the no contest plea which is avoiding the admission of guilt that is inherent in pleas of guilty. See 1 Weissenberger, Ohio Evidence (1985) 55, Section 410.1 and Advisory Committee Notes to Fed. R. Evid. 410. These purposes are not disserved by the admission of a conviction entered upon a no contest plea.

The issue of the applicability of Evid. R. 410 and Crim. R. 11(B)(2) aside, we note that the United States Supreme Court has authorized admission of prior convictions and pleas of no contest in death penalty cases, *Gregg v. Georgia* (1976), 428 U.S. 153,[1] and the majority rule that convictions

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[1] The court in *Gregg v. Georgia* examined the Georgia death penalty statutes. Georgia Code Ann. Section 27-2503 (Supp. 1975), as quoted in that case provides, in part: "'[T]he judge [or jury] shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, * * *." The court

entered on pleas of no contest are admissible to establish enhanced penalties. See Annotation (1963), 89 A.L.R. 2d 540, 610. Thus, we hold that Crim. R. 11(B)(2) and Evid. R. 410 do not preclude admission of a conviction entered upon a no contest plea to prove a prior murder specification under R.C. 2929.04(A)(5). Accordingly, this argument is without merit.

II

Appellant argues in his second proposition of law that the jury's verdict finding him guilty of the charges of aggravated murder during the course of a burglary and robbery in Counts One and Two but not guilty of the specifications based on the same conduct under each count was inconsistent and requires reversal.

The two aggravated-murder counts read as follows:

> Count One: "[T]he above named Defendant(s) *** unlawfully and purposefully caused the death of another, to-wit: John Allen, while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit an Aggravated Robbery."
>
> Count Two: "[T]he above named Defendant(s) *** unlawfully and purposely caused the death of another, to-wit: John Allen, while committing or attempting to commit or while fleeing immediately after committing or attempting to commit an Aggravated Burglary."

---

held that the Georgia death penalty statues were constitutional.

On each count of aggravated murder, appellant was found not guilty of these two specifications:

> "The Grand Jurors further find and specify that the offense presented above was committed while the offender was committing or attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Robbery and either the offender was the principal offender in the commission of the Aggravated Murder, or if not the principal offender, committed the Aggravated Murder with prior calculation and design and/or
>
> "The Grand Jurors further find and specify that the offense presented above was committed while the offender was committing or attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Burglary, and either the offender was the principal offender in the commission of the Aggravated Murder, or if not the principal offender, committed the Aggravated Murder with prior calculation and design; * * *."

Appellant argues that the verdicts are inconsistent because they seem to say appellant purposefully caused the death of John Allen during the course of an aggravated robbery and an aggravated burglary while at the same time saying he was not guilty of such offenses.

Initially, we note that the finding of guilt on the third specification involving a prior conviction is sufficient to warrant the death penalty regardless of the findings on specifications one and two. Additionally, we note that a close reading of the language in the principal charge and the two specifications reveals that there is not necessarily an inconsistency in the guilty verdict of aggravated murder under R.C. 2903.01(B) and the jury's finding of not guilty on

the two specifications. An individual can be convicted of aggravated felony murder as an accomplice absent a finding that either the individual was the "principal offender" or that he committed the murder with "prior calculation and design" as those terms were used in the first two specifications. Thus, a person would be guilty of murder but would not be guilty of the aggravating specification set out in R.C. 2929.04(A)(7). Therefore, appellant's argument that there is an inherent inconsistency in the results reached by the jury must be rejected. We would also point out that this issue is also resolved by our decision in *State v. Perryman* (1976), 49 Ohio St. 2d 14 [3 O.O.3d 8], vacated on other grounds (1978), 438 U.S. 911.

State v. Perryman presents precisely the situation in the instant case. In *Perryman*, the jury found the accused guilty of aggravated murder and aggravated robbery, but found the accused not guilty of a specification involving aggravated robbery. The court held in paragraph three of the syllabus that:

> "Where a jury convicts a defendant of an aggravated murder committed in the course of an aggravated robbery, and where that defendant is concurrently acquitted of a specification indicting him for identical behavior, the general verdict is not invalid."

In explaining its result, the court in *Perryman* stated at 26:

> "* * * The sentence was not based on an alleged inconsistency. The guilty verdict for count one reflects the jury's determination that appellant was guilty of the felony-murder. The determinations rendered as to the respective specifications can not change that finding of guilty. Furthermore, as

> indicated in R.C. 2929.03(A), one may be convicted of aggravated murder, the principal charge, without a specification. Thus, the conviction of aggravated murder in not dependent upon findings for the specifications thereto. Specifications are considered after, and in addition to, the finding of guilt on the principal charge. If more than one specification is charged, a finding of guilty on only one such specification is all that is required in order for the court to render the death sentence."

We hold that the guilty verdicts on the two counts of aggravated murder are not rendered invalid by the jury's finding of not guilty on the two specifications.[2]

III

In his third proposition of law appellant argues that the United States Supreme Court mandate in *Enmund v. Florida* (1982), 458 U.S. 782, is violated when a verdict is returned without an indication of whether or not an accused is found guilty as an aider and abettor when the jury has been instructed on aider-and-abettor principles and that the permitted use of such a procedure renders the Ohio death penalty statutes unconstitutional.

In *Enmund v. Florida* the court found that the evidence supported no more than an inference that the petitioner in that case was the driver of a car that was used to escape a robbery

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[2] Appellant's argument that the trial court committed error by instructing the jury that, in deciding the second issue of each specification, it must decide whether appellant "purposefully" committed aggravated murder is likewise rejected. R.C. 2903.01 provides that purposefulness is an element of aggravated murder. Therefore, the charge was not incorrect.

that involved two or murders. Thus, the petitioner clearly did not kill the victim, was not carrying a gun, and was not even present at the murders. The Supreme Court stated that an accused's culpability must be examined individually and that the death penalty may not be imposed on one "who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.* At 797. More specifically, the court variously described this evaluation of an accused's culpability as an examination of his "intentions, expectations, and actions," *id.* at 800, "of whether * * * [he] intended or contemplated that life would be taken," *id.* at 801, and whether he had an "intention or purpose that life will be taken. [*Id.* at 799]" The court's reasoning was that the two social purposes of the death penalty – retribution and deterrence of capital crimes – will not be served if one is sentenced to death whose culpability does not meet the above standard.

Appellant's culpability meets the standard enunciated in *Enmund.* Unlike *Enmund,* the evidence viewed most favorably to appellant places him at the killing with gun in hand and all the evidence presented supports a finding that appellant was the triggerman. Further, unlike *Enmund,* the jury in the instant case found that appellant "unlawfully and purposely caused the death" of Allen. The jury's finding that appellant "unlawfully and purposely caused the death" of Allen satisfies *Enmund v. Florida* because that degree of culpability falls squarely within the standards quoted above. Therefore, the evidence and the jury's verdict are sufficient to withstand the *Enmund* test.

Appellant's argument that Ohio's death penalty statute does not satisfy *Enmund* also lacks merit. R.C. 2903.01(D) provides that, "[n]o person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. * * *" Thus, an accused cannot be found guilty of aggravated murder unless he is found to

have intentionally caused the death of another. This intent standard falls squarely within the requirements of *Enmund*. Therefore, the Ohio death penalty statutes satisfy *Enmund v. Florida* because, for a conviction of aggravated murder, R.C. 2903.01 (D) requires a finding that the accused intentionally caused the death of another.

IV

In his fourth proposition of law, appellant urges this court to adopt a rule requiring the "death-qualification" of jurors independent and separate from one another. Appellant argues that examining the jurors while gathered as a group tends to predispose the jurors as to the accused's guilt and condition the jurors towards rendering the death penalty.

Independent questioning is not required by Ohio's death penalty statutes, and the United States Supreme Court has not ruled that it is required by the United States Constitution. In fact, many other jurisdictions have held that questioning prospective jurors while gathered as a group is permissible in capital cases. *See*, e.g., *State v. Kirkpatrick* (La. 1983), 443 So. 2d 546; *Lexington Herald-Leader Co., Inc. v. Meigs* (Ky. 1983), 660 S.W. 2d 658; *Irvin v. State* (Okla. Crim. App. 1980), 617 P. 2d 588. The determination of whether a *voir dire* in a capital case should be conducted in sequestration is a matter of discretion within the province of the trial judge. *State v. Gall* (1980), 65 Ohio App. 2d 57. The trial court's determination will not be reversed absent a showing of abuse of discretion. See *State v. Kirkpatrick*, *supra*. See, also, *Rosales-Lopez v. United States* (1981), 451 U.S. 182; *United States v. Gerald* (C.A. 5, 1980), 624 F. 2d 1291, *rehearing denied* (1980), 629 F. 2d 1350, certiorari denied (1981), 450 U.S. 920. Appellant has demonstrated no abuse of discretion or prejudice. Accordingly, this proposition of law is rejected.

V.

In his fifth proposition of law, appellant argues that he was denied his Fifth Amendment right to remain silent by the prosecutor's comment that appellant's statement during the sentencing phase was not made under oath.

Appellant did not testify during the guilt phase of trial, but gave an unsworn statement during the sentencing phase. Pursuant to R.C. 2929.03(D)(1), the prosecutor was not permitted to cross-examine on the unsworn statement. During the prosecutor's final argument, the following comments were made:

"You are supposed to look at the evidence hard, coldly, and say, is there mitigation, and does the defendant, he had the burden of going forward, he said to you, I chose not to take the oath.

"By his taking the stand like he did, and by him not taking an oath, this is what he is telling you. Number one, I am not going to subject myself to any response whatsoever. From that testimony –

"MR. CARLIN: Objection, your Honor.

"THE COURT: Overruled.

"MR. NUGENT: It means nothing.

"He says to you that he chooses not to be the same as you and take the oath that you took and every other witness took. He is the only person that came before you out of over 30 witnesses that didn't take the oath.

"And what should that mean to you? It should show you the kind of person that he is, that he doesn't want someone to

question him about, well, if you say that you weren't the trigger man, let's get a little information about that. Let the prosecutor ask you a couple of questions."

Appellant argues that these comments violated his right to remain silent. Comments similar to these were held permissible in *State v. Jenkins* (1984), 15 Ohio St. 3d 164. In *State v. Jenkins*, this court stated at 217 that the prohibition of *Griffin v. California* (1965), 380 U.S. 609, against prosecutorial comment on a defendant's failure to testify does not extend to an unsworn statement during the sentencing phase. If a defendant chooses to make an unsworn oral statement to the jury, the prosecution should be allowed to argue that the defendant's statement has less credibility because it is not given under oath. The jury must determine the weight attributed to the evidence presented, including defendant's unsworn oral statement. Therefore, the state should be able to dispute the weight of that statement without violating defendant's Fifth Amendment rights. This proposition of law is rejected.

VI

In his final proposition of law, appellant argues that the provisions of R.C. 2929.03(C)(2)(b) that require the same jury at the guilt and sentencing phases violate the impartial jury, effective assistance of counsel, equal protection and due process provisions of the Ohio and United States Constitutions.

R.C. 2945.25(C) permits challenge for cause in a capital case if a venireman "unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case." This statute finds its origin in *Witherspoon v. Illinois* (1968), 391 U.S. 510, wherein the Supreme Court stated that prospective jurors may be excluded for cause

when it is unmistakably clear that they will automatically vote against the death penalty without regard to the evidence or that their attitudes toward the death penalty will prevent them from making an impartial decision. Appellant argues that the process of "death-qualifying" jurors that sit for the guilt phase of a capital trial violates the rights of equal protection and due process because such jurors are not representative of a fair cross-section of the community and are conviction prone.

This argument was addressed in *State v. Jenkins, supra*, in which we noted that the United States Supreme Court has never required separate juries for the guilt and penalty phases of a capital trial.[3] In *Jenkins*, this court relied on *Keeton v. Garrison* (C.A. 4, 1984), 742 F. 2d 129[4]; *Adams v. Texas* (1980), 448 U.S. 38[5]; and *Smith v. Balkcom* (C.A. 5, 1981), 660 F. 2d 573, *certiorari denied* (1982), 459 U.S. 882, in

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[3] The Supreme Court in *Witherspoon v. Illinois* (1968), 391 U.S. 510, at 517-518, stated: "* * * We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was."

[4] Although the right to a jury trial includes the right to a jury venire drawn from a representative cross-section of the community, it does not include the right to be tried by jurors who are unable or unwilling to follow the law and the instructions of the trial judge in a capital case." *Keeten, supra*, at 133.

[5] "The State may insist, however, that jurors will consider and decide the facts impartial and conscientiously apply the law as charged by the court." *Adams* at 45.

holding at 188 that "death-qualify[ing] a jury prior to the guilt phase of a bifurcated capital prosecution does not deny a capital defendant a trial by an impartial jury." This holding controls this issue as raised in this case.

Appellant also argues that the use of the same jury at the guilt and penalty phases of his trial violated his right to trial by a fair and impartial jury and his right of effective assistance of counsel. Appellant argues that the jury did not fairly and impartially view him during the penalty phase because it had convicted him during the guilt phase and that appellant's counsel was not effective during the penalty phase for the same reason. These arguments were also rejected in *State v. Jenkins* where we stated: "Appellant also submits that since the same jury which convicted him also sentenced him, he was denied a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Sections 10 and 16, Article I of the Ohio Constitution. Appellant illustrates this contention by arguing that if defense counsel pursues a defense at the guilt phase of a capital trial which affects defendant's credibility, then his credibility is diminished at the sentencing state. Suffice it to say that although the Supreme Court has endorsed bifurcated proceedings in death penalty cases, see *Zant v. Stephens*, * * * [(1983), 462 U.S.____, 77 L. Ed. 2d 235] at 248, the court has yet to even remotely suggest that the Constitution requires a new jury be selected for the sentencing phase. Accordingly, we are unable to accept appellant's contention." *Id.* At 173-174, fn. 11.

This proposition of law is rejected.

VII

We now undertake the task of independently weighing the aggravating circumstances surrounding the murder of John Allen against the factors appellant has presented which mitigate against the imposition of the death penalty. R.C. 2929.05(A) mandates this weighing process and states in pertinent part:

> "* * * [T]he supreme court shall * * * review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors of the case * * *."

R.C. 2929.05(A) provides further:

> "* * * [T]he supreme court shall affirm a sentence of death only if the * * * court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case * * *."

In the instant case, appellant was found guilty of the aggravating circumstance of willfully killing one John Clark in New Jersey in 1972.[6] During the sentencing phase of the trial, appellant offered an unsworn oral statement claiming that he was not the triggerman in that prior New Jersey murder. He also testified that he had offered to plead guilty before trial in the instant case in exchange for life imprisonment without parole. Triggerman or not, the court in the previous case found that appellant "willfully,

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[6] Appellant received a sentence of eight to ten years' imprisonment for this conviction.

feloniously and * * * [with] malice of aforethought" murdered John Clark. Thus, that conviction satisfies R.C. 2929.04(A)(5). We place little weight on appellant's offer to plead guilty in the instant case. There is no provision in Ohio law for life imprisonment without possibility of parole. Thus, assuming appellant's offer was accepted – a guilty pleas in exchange for a possibility of parole – appellant would eventually be eligible for parole. Further, appellant's offer to plead guilty in no way excuses his culpability in two murders. After careful consideration of these mitigating factors at the time the life of John Allen was taken, we can come to but one conclusion: the mitigating factors do not outweigh the aggravating circumstances.

VIII

Our final determination must be whether the death sentence is appropriate in this case. R.C. 2929.05(A) provides in pertinent part:

> "* * *[T]he supreme court * * * determine * * * whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the * * * supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. * * *"

R.C. 2929.05(A) continues:

> "* * * [T]he supreme court shall affirm a sentence of death only if * * * [it] is persuaded from the record * * * that the sentence of death is the appropriate sentence in the case."

Appellant has been twice convicted of purposely causing the death of another. Capital punishment in this case can not be viewed as excessive when compared to its imposition in

State v. Jenkins, supra, for murder coupled with armed robbery, or in *State v. Maurer* (1984), 15 Ohio St. 3d 239, for murder coupled with kidnapping, or with *State v. Rogers* (1985), 17 Ohio St. 3d 174, for kidnapping, rape and murder. A review of these cases and the other cases in Ohio where the death penalty has been imposed has led the court to the conclusion that a sentence of capital punishment in the instant case is neither excessive nor disproportionate to the penalties imposed in similar cases. Therefore, we affirm the finding of the court of appeals that the death sentence is appropriate in the case.

IX

In conclusion, we first find that there is no merit to any of the specific issues raised by appellant concerning the proceedings below. Second, we find that the aggravating circumstances of a prior conviction of purposeful killing outweighs any and all of the mitigating factors presented by appellant. Third, we find the sentence of death to be appropriate in this case, as it is neither excessive nor disproportionate to the penalty imposed in similar cases. Thus, in accordance with R.C. 2929.05(A), we affirm the conviction and sentence of death in this case.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

DAHLING, LOCHER, HOLMES, CLIFFORD F. BROWN and DOUGLAS, JJ., concur.

CELEBREZZE, C.J., concurs and concurs separately.

DAHLING, J., of the Eleventh Appellate District, sitting for SWEENEY, J.

CELEBREZZE, C. J., concurring. I join my brethren in affirming both the conviction and sentence in this cause. However, I fear that Part V of the majority opinion could be misread to imply that an accused waives his Fifth Amendment[7] protection against self-incrimination by electing to exercise his statutory option of making an unsworn statement to the jury during the penalty phase of a capital proceeding.

"In *Griffin v. California* (1965), 380 U.S. 609, [32 O.O.2d 437], the Supreme Court ruled as prejudicial direct comments upon the accused's failure to take the stand. In so holding, the court recognized that to allow such comments would penalize an accused for exercising his constitutional right against self-incrimination." *State v. Ferguson* (1983), 5 Ohio St.3d 160, 162.

Similarly, paragraph one of the syllabus in *State v. Lynn* (1966), 5 Ohio St. 2d 106, [34 O.O. 2d 226], provides:

> "Comment by the trial court or by the prosecutor upon the failure of an accused to testify in a criminal proceeding against him violates the self-incrimination clause of the Fifth Amendment made applicable to the states by the Fourteenth Amendment. (United States Supreme Court in *Griffin v. California*, 14 L. Ed. 2d 106.)" See, also, *Lockett v. Ohio* (1978), 438 U.S. 586 [9 O.O. 3d 26]; *Johnson v. United States* (1943), 318 U.S. 189.

The Fifth Amendment protection affording an accused the right to remain silent extends to every "criminal proceeding." *Lynn, supra.* This safeguard undoubtedly

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[7] See the Fifth Amendment to the United States Constitution and Section 10, Article I, Ohio Constitution.

embraces the penalty phase of capital cases where defendants compete with the prosecutors for their very lives.

In exercise of his Fifth Amendment right to remain silent, appellant chose not to testify during either the guilt or penalty phases of his capital trial. However, appellant exercised his statutory right[8] to make an unsworn statement to the jury during the sentencing phase only.[9]

Pursuant to the express terms of the statute the prosecutor was forbidden to question appellant. The trial court properly advised the jury of appellant's rights in this respect and explained that the state was statutorily precluded from cross-examination.

In this regard it must be recognized that rather than modifying or creating an exception to the constitutional prohibition announced in *Griffin*, the Ohio Legislature merely provided a means whereby an accused could decide to make an unsworn statement in mitigation, not subject to cross-examination, without waiving his constitutional

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[8] R.C. 2929.03(D)(1) provides in pertinent part: " * * * The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation."

[9] One primary purpose of the unsworn statement is to allow the defendant the opportunity to present a personal account so that the jury may better determine if the aggravating evidence of the case is in any way mitigated when viewed through the subjective eyes of the capital defendant. The weight and credibility to be assigned such unsworn remarks are, of course, matters for the jury to determine.

protection against self-incrimination and without incurring risk of a prosecutor arguing that his election to make such a statement is somehow evidence of guilt.

The applicability of our holding in *Lynn* to such remarks made during a capital sentencing hearing was recently considered in *State v. Jenkins* (1984), 15 Ohio St. 3d 164. During closing argument of the penalty phase of Jenkins' trial, the prosecutor stated:

"Let me make a note of something else while I talk about that statement [of Jenkins]. You notice, ladies and gentlemen, that throughout this trial, this part, as well as the previous part, their witnesses came in and the witness took the oath--."

At this point, "[t]he defense promptly objected and the objection was sustained. A contemporaneous motion for mistrial was denied. The court warned the prosecutor to abandon the argument and then instructed the jury to disregard the prosecutor's comments." *Id.* at 216.

On appeal Jenkins similarly claimed that the prosecutor's comment constituted a constitutional violation of the rule set forth in *Griffin v. California, supra*, as expressly recognized by this court in *State v. Lynn, supra*. This court rejected Jenkins' contentions by concluding that the prosecutor's utterances did not constitute prejudicial reversible error because the cases relied on were inapposite.

The distinction we made between *Jenkins* and the earlier cases was based on the content of the statements within the circumstances presented. Neither our decision in *Jenkins* nor our holding in the case *sub judice* should be read as establishing a broad rule that the Fifth Amendment is inapplicable once an accused chooses to address the jury in the sentencing phase. Simply put, *Jenkins* does not create a

per se blanket exception whereby a prosecutor has unlimited privilege to comment unfavorably on a capital defendant's choice to exercise a constitutional right. To the contrary, the purpose and protection of *Griffin* and *Lynn* are just as vital, if not more so, during the sentencing portion of a capital trial because a life is at stake. "Whether guilty or not, a defendant is entitled, as is every person charged with crime, to a fair trial." *State v. Petro* (1947), 148 Ohio St. 473, [36 O.O. 152], paragraph twelve of the syllabus.

In considering errors based on isolated remarks or testimony, a reviewing court must view the claim against the entire record. The Supreme Court of the United States has reminded us that:

> "In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal trial into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution." *Johnson v. United States* (1943), 318 U.S. 189, 202 (Frankfurter, J., concurring).

As noted previously, central to our conclusion in *Jenkins* was a full consideration of the circumstances. The determination of whether prosecutorial remarks violate constitutional rights requires more than a mere color-matching of cases. It requires a careful evaluation of all the circumstances surrounding the statements. Cf. *Jenkins, supra*, at 232.

Such an evaluation reveals that in this case, as in Jenkins, the accused " * * * did not choose to remain silent. He exercised his option to speak." *Id.* at 216. Additionally, the prosecutor's comments concerning

appellant's credibility " * * * said nothing more than what the jury already knew to be true, namely, that all other *** witnesses testified under oath and that appellant did not." *Id.* at 217. The instant record also reflects that while the prosecutor did not cross-examine appellant, the defense was granted great leeway in the presentation of evidence: the court permitted defense counsel to develop appellant's unsworn statement by questioning his client before the jury.

Lastly, the court correctly instructed the jury on several occasions relative to the accused's statutory right to make an unsworn statement. The court also instructed the jurors that counsels' arguments did not constitute evidence. The court's charge following closing arguments advised the jurors that they should consider all proper evidence including the unsworn statement of the appellant. In fact, during the course of their deliberations, the jurors requested and were read appellant's entire unsworn mitigation statement without comment, to weigh and consider.

This is undeniably a close question presented in the midst of a death penalty review which is always the most difficult of all appellate tasks. In a slightly different setting, offending remarks similar to those made in this proceeding could result in a
different resolution.

However, under *these circumstances*, " *** the prosecutor's remarks, when reviewed in context, cannot be said to undermine the fairness of the trial and contribute to a miscarriage of justice." *United States v. Young* (1985), 470 U.S____, 84 L.Ed.2d 1, 15. Accordingly, I concur with today's rejection of appellant's contention.

APPENDIX F

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
NO. 47191

STATE OF OHIO, Plaintiff-Appellee	:	
v.	:	JOURNAL ENTRY
DAVID MAPES, Defendant-Appellant.	:	AND OPINION

DATE OF ANNOUNCEMENT OF DECISION: OCT 25 1984

CHARACTER OF PROCEEDING: Criminal Appeal From Common Pleas Court Case No. CR-181.703

JUDGMENT: Modified and affirmed as modified

DATE OF JOURNALIZATION: NOV 5, 1984

APPEARANCES:

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PARRINO, P.J.:

Defendant, David Mapes, was found guilty by a jury of two counts of aggravated murder (R.C. §2903.01(B)). They also found defendant guilty of a specification under each count of aggravated murder for having a firearm on or about his person during the commission of the aggravated murder (R.C. 2929.71). Finally, the jury found defendant guilty of two counts of aggravated robbery (R.C. 2911.01) and one count of aggravated burglary (R.C. 2911.11). He was found not guilty of aggravating specifications one and two of aggravated robbery and aggravated burglary under each count of aggravated murder (R.C. 2929.04(A)(7)).

In a separate hearing conducted pursuant to R.C. 2929.022, the trial judge determined that defendant was guilty of the aggravating specification to the two counts of aggravated murder for violation of R.C. 2929.04(A)(5) which provides:

> "**Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another**, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender." (Emphasis added.)

The jury recommended the death penalty after the subsequent sentencing hearing for the two counts of aggravated murder. The jury concluded that the aggravating circumstance outweighed any mitigating factors. The trial court independently determined that: "All of the alleged mitigating factors presented mostly by argumentation of counsel bear no weight whatsoever when compared to the single aggravating circumstance, that is, the purposeful prior killing in which the defendant willfully, feloniously and with

malice aforethought did kill and murder John Clark." *See* Opinion of the Trial Judge in Capital Case, p. 5. The court sentenced defendant to death for the two counts of aggravated murder and to imprisonment for the other convictions.

We conclude that the two convictions for aggravated murder must merge. In all other respects, we affirm the convictions and sentences imposed by the trial court.

On Sunday January 30, 1983, between 7 and 8 a.m., John Allen was shot and killed during the course of an aggravated robbery at Chaps Bar (Chaps or bar) at 2408 Prospect Avenue in Cleveland. Defendant and Rodney Newton entered the bar through a broken window in the back of the building and walked to the bar where they heard voices. Mapes was carrying a sawed-off shotgun.

Several men were in the bar when Mapes and Newton entered. John Allen, the decedent and one of the owners of the bar, was standing at the bar talking to Ronald Rucci and Michael Williams. John Hovekamp, Jr. who lived at Chaps, was asleep in the pit area of the bar along with David Yun.

Mapes walked into the bar first and told the men that this was a robbery. Newton was standing directly behind defendant. Allen started to lift his hands and Mapes fired the shotgun. The decedent was shot in the face and died instantly.

Newton checked the registers behind the bar for money, but he did not find any as it had been previously placed in the vault for safekeeping. Mapes had Rucci and Williams lie on their stomachs and asked them where the money was. They told him that it was in the storage room. Money was taken out of Rucci's and Williams' pockets.

Until that point the defendant and Newton were unaware that Hovekamp and Yun were down in the pit area. Newton finally saw the two men and told Mapes. Mapes guarded the four men while Newton broke into the video game machines with a crowbar. Mapes eventually gave Newton the shotgun so that defendant could finish emptying the coins out of the machines. After the last of the machines was emptied, Mapes took the shotgun back, and they left the same way they entered. On the way out, Mapes attempted to open the safe but he was unsuccessful.

Mapes was arrested for the murder of John Allen on February 8, 1983 at his apartment.

At trial Ronald Rucci testified that he observed the defendant enter Chaps on the Saturday night prior to the murder as a customer. He further stated that he and his partner, Michael Williams, had moved into the bar three days prior to the murder for the purpose of doing promotional work for Chaps. According to Rucci, the bar had closed at approximately 4 a.m. Sunday morning. Williams, Rucci and Allen were discussing plans for a Valentine's Day project when Mapes and Newton entered. While Rucci did not see the face of the man who carried the gun and killed Allen, he did testify the man had on a black leather coat.

At trial Newton testified for the state. He stated that he had been staying with Mapes and his wife, "Peaches" at their basement apartment in the Towne House Apartments about a week before the incident at Chaps. These apartments are located next door to Chaps. Mapes approached Newton about robbing Chaps two days before the incident, but Newton was opposed to the idea. Mapes again told Newton that he wanted to rob Chaps on the evening of January 29, 1983. He told Newton that he had already been inside, and he had seen power tools and mirrors that they could steal. At 2 a.m. on January 30, Mapes awakened Newton so they

could break into the bar. After observing numerous people in the vicinity, they decided to return later. Newton stated that he and Mapes went back to the bar later that same morning. Newton testified that Mapes was the one who killed John Allen. He also said that Mapes was wearing a bluish-black leather jacket the morning of the murder.

The testimony of Newton further established that when the two men returned to their apartment, Mapes placed some shotgun shells into a sewer drain by the front door and stuffed the drain with newspaper. Mapes also washed his wrists with a grapefruit and asked his wife to wash his clothes. Newton stated that Mapes took the shotgun to the home of a sister of another Towne House Apartment resident, Leon Jenkins. Newton testified that Leon Jenkins took him to Twinsburg that same day. Newton was arrested in Akron on March 4, 1983. He gave a written statement to police shortly after his arrest.

John Hovekamp, Jr. testified that he was living and working as a carpenter at Chaps on January 30, 1983. He was asleep in the pit area of the bar when he heard a shot. He saw Williams crawling on the floor and heard Rucci yelling at him to keep his head down. He also heard the video game machines being broken into. Hovekamp identified Mapes as the man he saw carrying a shotgun during this event. A few days after the murder, he was shown approximately ten photos by police. He picked three. He told police that one in particular looked like the man he had seen with the shotgun. That photo was of David Mapes. On February 11, 1983 Hovekamp selected Mapes from a line-up.

Michael Reese testified that the defendant spoke to him in the Town House Apartments' parking lot about robbing Chaps. Mapes told Reese that he had a gun. Mapes suggested that they break into the pinball machines with a crowbar which he had also acquired. Mapes further said that

a Sunday morning would be the best time for a robbery because all the receipts from the week would be there. Reese stated that he saw a newscast of the Chaps murder and robbery on the evening of January 30, 1983. Reese contacted and informed the police about the conversation that he had with Mapes. He related the conversation to Detective George Kunz. Reese also testified that he saw defendant in the county jail about March 30, 1983 after Mapes was arrested and Reese was, at that time, confined in jail for another matter. Mapes told Reese at that time that he was concerned about Newton's statement; however, he was not too worried about Reese's and Hayward Chambers' statements.

In April two men came to Reese's house to allegedly investigate the crime. Reese called the Homicide Department of the Cleveland Police and determined that the men had not been sent by the police. As a result of this event, Reese went to see the defendant's wife and asked her to have Mapes call him. Defendant called Reese on May 1, 1983. Mapes told Reese in that telephone conversation that he wished what happened in the bar "could have been another way." Mapes also stated that he got about $1,000 out of the robbery.

Christine Alexander, another resident of the Towne House Apartments, testified that Peaches Mapes often came to visit her apartment. On the evening of January 29 several people were in Alexander's apartment including defendant, Peaches, Hayward Chambers (Alexander's son), and Clarence Johnson. She overheard Mapes approach Johnson about robbing "Jack's" bar. She also heard Mapes trying to persuade Johnson to go next door. Mapes and Johnson went to Chaps for a drink. Later that evening Mapes brought a bag into Alexander's apartment and placed it into her closet. She later saw Mapes pull a shotgun out of this bag.

Hayward Chambers testified that the defendant showed him a shotgun about the middle of January, 1983. At that time defendant stated he had broken a window in Chaps and was going to get money out of the video game machines. Chambers also stated that on the morning of January 30, 1983 he spoke with Mapes who stated he wanted to get rid of some shotgun shells. Mapes told Chambers that he "dropped" a man. On January 31, 1983 Mapes attempted to persuade Chambers to give him money so that he could leave town because he was in trouble due to the incident at Chaps. Mapes also stated that if he had known Newton was going to get scared, he would have killed him too. He also said that if anyone talked, they would get the same. Chambers refused to give defendant any money.

Detective George Kunz testified that the defendant contacted the police in March after he found out that Newton had been arrested and that shotgun shells had been recovered from the drain in his former apartment. Mapes claimed that he had owned a shotgun for protection. He stated that his cat had played with the shotgun shells and knocked them down the drain. Mapes then stuffed the drain with paper and covered it with a rug. Mapes told police at that time that Newton and a man named "Red" were involved in the Chaps incident. The police were never able to locate the individual named "Red".

Detective James Svekric testified that when he was investigating the murder on the morning of January 30, 1983, he saw Mapes standing near the rear gate of the building in which Chaps was located. Svekric also stated that when he questioned Mapes, he denied being home on January 30. Mapes also denied owning a shotgun.

Officer Timothy Patton of the Cleveland Police testified that shortly after his arrest Mapes told police that he served as a lookout for Newton and "Red" outside of the Chaps

building. Furthermore, defendant said that he was unaware that a man had been murdered in the incident until the following day.

Officer Patrick H. Reynolds of the Cleveland Police Scientific Investigation Unit testified that the shotgun shell pellets taken from the drain in the defendant's apartment matched the pellets taken from the decedent's head. Reynolds also testified that the crowbar recovered from defendant's apartment matched marks made on the metal lids to the coin boxes on the video machines.

Peaches Mapes testified on behalf of her husband. She stated that her husband never told her that he had killed a man and that she did not see him stuff shotgun shells down the drain in their apartment. However, she did say that the defendant owned a sawed-off shotgun in January of 1983.

At the trial for the aggravating specification (R.C. 2929.04(A)(5)) Detectives John Rafferty and Thomas Henion of the City of Paterson, New Jersey Police Department, testified that defendant was arrested along with two other individuals for the murder of John Clark in March of 1972. Mapes entered a non vult plea to first degree murder and was found guilty by the New Jersey judge. A copy of the indictment and final judgment of conviction were admitted into evidence.

After defendant was found guilty of the two aggravated murder counts and the aggravating specification, the penalty hearing was held before the jury. Defendant made an unsworn statement in which he stated that he was not the triggerman in the 1972 New Jersey murder, and that he had no control over the events occurring in that incident. The defense presented no other evidence about mitigating factors.

Rodney Newton testified again at the penalty hearing. He stated that on March 23, 1983 Mapes asked Newton not to say anything about the incident at Chaps. The two men were placed in a holding cell together prior to a pretrial. Mapes also stated that he had been in a situation similar to this in New Jersey and his friends all refused to say anything to the police. As a result, Mapes said that he received only a short prison term. After appearing before the court that same day and hearing of Newton's statement, Mapes told Newton to watch himself when he went to jail because he was a "snitch".

Appellant assigns twelve errors on appeal.

"I. THE APPELLANT'S DEATH PENALTY SENTENCES MUST BE VACATED BECAUSE THE ONLY SPECIFICATION FOUND, A PRIOR NEW JERSEY MURDER CONVICTION BASED UPON A NON VULT PLEA, WAS USED AGAINST THE APPELLANT IN VIOLATION OF CRIM R 11(B)(2)."

"II. THE APPELLANT'S DEATH PENALTY SENTENCES MUST BE VACATED BECAUSE THE ONLY SPECIFICATION WAS FOUND BY USING EVIDENCE OF A PRIOR NON VULT PLEA AGAINST THE APPELLANT IN VIOLATION OF EVIDENCE RULE 410."

As the first two assignments of error are related in law and fact, they will be addressed together.

Appellant contends that his conviction of the aggravating specification under R.C. 2929.04(A)(5) must be reversed because evidence of a non vult plea by defendant in the New

Jersey conviction was admitted contrary to the provisions of Crim. R. 11(B)(2)[10] and Evid. R. 410.[11] The New Jersey judgment entry of conviction happened to include the fact that defendant entered a plea of non vult.

We do agree with appellant that a plea of non vult is the equivalent to a plea of nolo contendre or of no contest for purposes of Crim. R. 11(B)(2) and Evid. R. 410. *See* WRIGHT, FEDERAL PRACTICE AND PROCEDURE, CRIMINAL §177 (1982); Annot., 89 A.L.R. 2d 540 91963). However, we do not agree with appellant that the introduction of the New Jersey judgment entry of his conviction which also referred to his plea of non vult in this case resulted in reversible error.

It is important to point out the Crim. R. 11(B)(2) and Evid. R. 410 only prohibit the admission of no contest pleas. They do not prohibit the introduction of a judgment of conviction subsequent to such a plea when that conviction is deemed relevant by statute or the Rules of Evidence to an issue at trial. However, appellant's non vult plea and his sentence upon conviction are contained in the same New Jersey judgment entry.

Defense counsel's objection to the introduction of the judgment was based on the fact that it did not contain specific reference to appellant's conviction for murder and that the entry was not properly authenticated. These contentions lack merit. The purpose for introduction by the state at the specification hearing of the New Jersey indictment and judgment entry was to help prove appellant's prior conviction for murder, not that he entered a plea of non vult. Under these circumstances we find no violation of Crim. R. 11(B)(2) or Evid. R. 401.

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[10] *See* Appendix.

[11] *See* Appendix.

We also see no prejudice in the admission of this evidence. The determination of guilt as to the aggravating specification for conviction of a prior purposeful killing was tried to the trial judge. A reviewing court will not reverse the judgment of a trial court, following a bench trial, on the ground that erroneous evidence was admitted, unless the court expressly based its judgment in part upon inadmissible evidence or the judgment was not supported by sufficient competent evidence. *Beamer v. Beamer* (1969), 17 Ohio App. 2d 89, 96.

In the case *sub judice*, the trial court did not base its decision exclusively upon the non vult plea. Substantial evidence was admitted that appellant was previously convicted of the New Jersey murder. Detectives Henion and Rafferty of the City of Paterson in New Jersey testified at the proceedings conducted by the trial judge that appellant was convicted of that prior murder.

Finally, we do not see how the mention of the non vult plea by defense counsel could have prejudiced appellant at the sentencing phase. The prosecutor did not at any time attempt to use the plea as an admission of guilt to the jury. The jury was merely told at that time that appellant was guilty of the aggravating specification of a prior purposeful killing. They were instructed to weigh any mitigating factors against that aggravating circumstance. At that point, a determination of guilt had been made by the jury and a finding of guilt as to the specification had been made by the court. Furthermore, appellant presented no evidence, other than his unsworn statement, of any mitigating factors. Thus, the jury was constrained to recommend the death penalty.

In addition, in analagous cases it has been held that a prior conviction based on a plea of no contest is admissible for enhancement of punishment in a subsequent prosecution

for the same type of offense. *State v. Rivers* (Aug. 22, 1984), Ct. App. 2d Dist. No. 83 CA-90, unreported. *See generally People v. Gordon* (Colo. 1979), 593 P.2d 326; 89 A.L.R. 2d, 540 (1963).

The first two assignments of error are overruled.

"III. THE PROVISIONS OF R.C. 2929.03 (C)(D) REQUIRING THE USE OF THE SAME JURY AT BOTH THE GUILT PHASE AND SENTENCING PHASE OF A CAPITAL CASE ARE UNCONSTITUTIONAL AS DRAWN SINCE AN ACCUSED IS, AND IN THIS CASE THE APPELLANT WAS, DENIED THE FUNDAMENTAL RIGHTS OF AN IMPARTIAL JURY, EFFECTIVE ASSISTANCE OF COUNSEL, EQUAL PROTECTION AND DUE PROCESS OF LAW AS GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTIONS TEN AND SIXTEEN OF THE OHIO CONSITUTION."

"A. BECAUSE R.C. 2929.03 (C)(D) MANDATES USE OF THE SAME JURY IN BOTH THE GUILT AND SENTENCING PHASES JURORS MUST BE 'DEATH-QUALIFIED' A PROCESS WHICH, AS DONE IN APPELLANT'S TRIAL OVER OBJECTION, VIOLATES AN ACCUSED'S AND HERE APPELLANT'S, CONSTITUTIONAL GUARANTEES TO AN IMPARTIAL JURY, EQUAL PROTECTION AND DUE PROCESS OF LAW IN THE DETERMINATION OF GUILT OR INNOCENCE."

"B. BY REQUIRING AN ACCUSED AND COUNSEL TO ADDRESS THE SAME JURY AT BOTH THE GUILT AND THE SENTENCING PHASES R.C. 2929.03 (C)(D) PROVIDES FOR A PROCEDURE WHICH VIOLATES AN ACCUSED'S, AND IN THIS CASE THE APPELLANT'S CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE COUNSEL, AN IMPARTIAL JURY AND DUE PROCESS OF LAW."

Appellant asserts that the Ohio statutory scheme which allows the same jury to hear both the guilt and penalty phases of a capital case denies an accused an impartial jury at the guilt phase of trial. By this appellant means that the selection of a "death qualified" jury pursuant to *Witherspoon v. Illinois* (1968), 391 U.S. 510, does not result in impartiality because (1) "death qualified" juries are not representative of a fair cross-section of the community; and (2) "death qualified" jurors are conviction prone. Appellant further contends he was denied effective assistance of counsel at the penalty phase because his attorney who argued for appellant's innocence at the guilt phase cannot be an effective advocate at the sentencing phase.

In *Witherspoon*, the Supreme Court first considered the issue of "death qualified" jurors in which it stated exclusion of those individuals who stated "they would not even consider returning a verdict of death" was proper. 391 U.S. at 520. Twelve years later in *Adams v. Texas* (1980), 448 U.S. 38, 46, the court held:

"THIS LINE OF CASES ESTABLISHES THE GENERAL PROPOSITION THAT A JUROR MAY NOT BE CHALLENGED FOR CAUSE BASED ON HIS VIEWS ABOUT CAPITAL PUNISHMENT UNLESS THOSE VIEWS WOULD PREVENT OR

SUBSTANTIALLY IMPAIR THE PERFORMANCE OF HIS DUTIES AS A JUROR IN ACCORDANCE WITH HIS INSTRUCTIONS AND HIS OATH. THE STATE MAY INSIST, HOWEVER, THAT JURORS WILL CONSIDER AND DECIDE THE FACTS IMPARTIALLY AND CONSCIENTIOUSLY APPLY THE LAW AS CHARGE BY THE COURT."

Ohio has codified authorization for a challenge for cause in such situations in R.C. 2945.25(C):

"(C) IN THE TRIAL OF A CAPITAL OFFENSE, THAT HE UNEQUIVOCALLY STATES THAT UNDER NO CIRCUMSTANCES WILL HE FOLLOW THE INSTRUCTIONS OF A TRIAL JUDGE AND CONSIDER FAIRLY THE IMPOSITION OF A SENTENCE OF DEATH IN A PARTICULAR CASE. A PROSPECTIVE JUROR'S CONSCIENTIOUS OR RELIGIOUS OPPOSITION TO THE DEATH PENALTY IN AND OF ITSELF IS NOT GROUNDS FOR A CHALLENGE FOR CAUSE. ALL PARTIES SHALL BE GIVEN WIDE LATITUDE IN VOIR DIRE QUESTIONING IN THIS REGARD."

Appellant does not dispute that a jury may be "death qualified" in the penalty phase, but rather argues that because Ohio allows that "death qualified" jury to also hear the guilt phase a conviction-prone jury is the result. Appellant cites to *Grigsby v. Mabry* (E.D. Ark. 1983), 569 F. Supp. 1273, in support of this theory. *Grigsby* contains empirical data which lends credence to appellant's argument under this assignment of error.

This court has previously considered *Grigsby* and its rationale that death qualification results in a jury more likely to convict in the penalty phase. In *State v. Jenkins* (Feb. 24, 1984), Cuyahoga App. No. 45231, it was held:

> "FIRST, WE ARE MINDFUL OF THE LIMITATIONS INHERENT IN THE STUDIES WITH WHICH DEFENDANT HAS PROVIDED US, SOME OF WHICH ARE DISCUSSED IN *GRIGSBY*. WE ARE DUBIOUS ABOUT GENERALIZING THE RESULTS OF SUCH LIMITED DATA. BUT, EVEN IF WE ASSUME THAT A SO-CALLED 'DEATH QUALIFIED' JURY IS MORE LIKELY TO CONVICT, DEFENDANT WAS NOT THEREBY DENIED A FAIR TRIAL. SEE *SMITH V. BALKOM* (C.A. 5,1981), 660 F.2D 573, MODIFIED, 671 F. 2D 858, CERT. DENIED, 103 S. CT. 181 (1982); *CALIFORNIA V. FIELDS, SUPRA*."

> "EACH PARTY IS GUARANTEED THE RIGHT TO A JURY WHICH DOES NOT DESIGNEDLY EXCLUDE A FAIR CROSS SECTION OF DEMOGRAPHICALLY DISTINCTIVE POPULATION GROUPS. *DUREN V. MISSOURI* (1979), 439 U.S. 357; *TAYLOR V. LOUISIANA* (1975), 419 U.S. 522. FURTHER, EACH PARTY IS ENTITLED TO A JURY WHICH DOES NOT DESIGNEDLY INCLUDE JURORS WITH AN IDENTIFIABLE ANTAGONISM OR PREJUDICE. THE CONSTITUTION GUARANTEES THESE JURY CHARACTERISTICS FOR THE ACCUSED IN A CRIMINAL CASE. PROCEDURAL EQUITY DEMANDS THAT THE STATE BE ACCORDED THE SAME RIGHTS. SEE *WILLIAMS V. WAINWRIGHT* (C. A. 5, 1970),

427 F. 2D 921, 923; *SPINKELLINK V. WAINWRIGHT* (C.A. 5, 1978), 578 F. 2D 582, 596, CERT. DENIED, 99 S. CT. 1548 (1979)."

"THERE IS NO CONSTITUTIONAL, STATUTORY, JUDICIAL, OR COMMON LAW RULE THAT GUARANTEES A COMPLETELY IMPARTIAL JURY IN AN ABSOLUTE SENSE. NO PERSON THAT TAKES HIS OR HER PLACE AS A JUROR IS FREE FROM ALL ATTITUDES, BIASES OR PREJUDICES, LATENT OR OVERT. A JUROR'S ATTITUDINAL SET NECESSARILY REFLECTS HIS OR HER INDIVIDUAL EXPERIENCES."

"THE LAW GUARANTEES ONLY THAT EACH PARTY MAY EXCLUDE FOR CAUSE THOSE JURORS WHOSE ANSWERS DEMONSTRATE PARTIALITY. ADDITIONALLY, THE LAW ACCORDS EACH PARTY AN OPPORTUNITY TO EXCUSE A LIMITED NUMBER OF PROSPECTIVE JURORS BY PEREMPTORY CHALLENGES, INCLUDING THOSE WHOM THAT PARTY PERCEIVES AS ANTAGONISTIC."

"THUS, JURORS WHO CLEARLY INDICATE THAT THEIR ATTITUDES WILL PREVENT THEM FROM DECIDING THE CASE ACCORDING TO THE LAW ARE PROPERLY EXCLUDED FOR CAUSE. *ADAMS V. TEXAS* (1980), 448 U.S. 38, 44-45. IF DEFENDANT HAD A RIGHT TO JURORS WHO WOULD NOT APPLY THE LAW, THE STATE WOULD LOSE ITS RIGHT TO EXCLUDE UNCONTROLLABLY BIASED JURORS. THERE IS NO CONSTITUTIONAL GUARANTEE THAT AN ACCUSED

WILL HAVE JURORS WHO OPPOSE CAPITAL PUNISHMENT OR HOLD ANY OTHER SPECIFIED VIEW. DEFENDANT HAS FAILED TO ALLEGE ANY RIGHTS THAT OUTWEIGH THE STATE'S RIGHT TO JURORS WHO WILL FOLLOW THE LAW."

"DEFENDANT ALSO ARGUES THAT THIS EXCLUSION PROCESS DENIED HIM HIS RIGHT TO A JURY DRAWN FROM A FAIR CROSS SECTION OF THE COMMUNITY, CITING *TAYLOR V. LOUISIANA* (1975), 419 U.S. 522. HOWEVER , TAYLOR AND ITS PROGENY ARE NOT APPLICABLE HERE."

"THE STATE CANNOT EXCLUDE JURORS WITH IMPORTANT COMMUNITY ATTITUDES LIKE PHILOSOPHICAL OPPOSITION TO CAPITAL PUNISHMENT IF THOSE JURORS CAN STILL FOLLOW THE LAW. HOWEVER, THE CONSTITUTIONAL REQUIREMENT THAT JURORS BE CHOSEN FROM A FAIR CROSS SECTION OF THE COMMUNITY DOES NOT RELATE TO COMMUNITY ATTITUDES. RATHER, IT CONCERNS GROUPS WITH DEMOGRAPHICALLY DISTINCTIVE CHARACTERISTICS, SUCH AS RACE, SEX, NATIONAL ORIGIN, OR RELIGION. *CALIFORNIA V. FIELDS, SUPRA; STATE V. PUENTE, SUPRA*, AT 138-139. IT APPLIES TO GROUPS SUBJECT TO COMMUNITY PREJUDICE. *HERNANDEZ V. TEXAS* (1954), 347 U.S. 475; *SWAIN V. ALABAMA* (1965), 380 U.S. 202, 205."

"'NOTHING IN *TAYLOR* GUARANTEES THAT A RIGHT TO A REPRESENTATIVE JURY INCLUDES THE RIGHT TO BE TRIED BY

JURORS WHO HAVE EXPLICITLY INDICATED THEIR INABILITY TO FOLLOW THE LAW AND THE INSTRUCTIONS OF THE TRIAL JUDGE.' *LOCKET V. OHIO, SUPRA* AT 596-597."

This court's position in *Jenkins* seems to be consistent with the current position of the United States Supreme Court. In *Maggio v. Williams* (1983), ____ U.S. ____, 104 S. Ct. 311, the court vacated a stay of execution where one of the issues was that the jury which convicted the defendant had been "death qualified." Hence, that defendant argued the jury was not representative of the population. The court held that further review was not necessary since the voir dire was in compliance with *Witherspoon*. Moreover, the Supreme Court has approved of the bifurcated trial procedure employed in this state. In *Gregg v. Georgia* (1976), 428 U.S. 153, the court stated the Georgia death penalty procedure, remarkably similar to Ohio's, was constitutionally permissible.

Our review of the record reveal that all of the jurors who were excused based on the "death qualification" guidelines (Loieri, Bickerstaff, Hill, McCastle, Lesko, Fagan, Allevato and Kilty) were properly excused after they had unequivocally stated they would not be able to follow the law and vote to impose the death penalty under any circumstances. Thus, the voir dire was in compliance with all of the relevant constitutional and statutory provisions.

Appellant also argues when two issues were tried by the same jury he was denied effective assistance of counsel at sentencing because of possible inconsistent positions taken by counsel at the two different phases of trial.

Clearly a defendant has the Sixth Amendment right to counsel at the sentencing phase of the proceedings. See *Mempa v. Rhay* (1967), 389 U.S. 128. However, to prevail

on an ineffective assistance of counsel argument, a defendant must show (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington* (1984), ____ U.S. _____, 104 S. Ct. 2052. We hold that appellant's counsel was able to and did perform his duties in keeping with the statutory framework established in the bifurcated trial procedure. This court has previously held with regard to bifurcated trials that "counsel's duty to select among possible defense positions does not deny his client effective assistance." *State v. Shields* (January 26, 1984), No. 46012. Furthermore, appellant has failed to evince any prejudice arising from the trial procedure.

We overrule appellant's third assignment of error.

"IV. THE JURY'S VERDICT OF GUILTY ON COUNTS ONE AND TWO, AND NOT GUILTY ON THE FIRST AND SECOND SPECIFICATIONS IN EACH COUNT, ARE INCONSISTENT RESPONSES ARISING OUT OF THE SAME COUNT, FOR WHICH THE APPELLANT'S CONVICTIONS SHOULD BE REVERSED FOR THE JURY'S FAILURE TO PROPERLY APPLY INSTRUCTIONS."

At the conclusion of the guilt or innocence phase of the trial, the jury found the appellant guilty of two counts of aggravated murder. However, he was found not guilty of specifications one and two under each count. Appellant argues that the verdicts are inconsistent and the guilty verdicts should be reversed.

The two aggravated murder counts read as follows:

COUNT ONE:

"[T]HE ABOVE NAMED DEFENDANT(S) . . . UNLAWFULLY AND PURPOSELY CAUSED THE DEATH OF ANOTHER, TO-WIT: JOHN ALLEN, WHILE COMMITTING OR ATTEMPTING TO COMMIT, OR WHILE FLEEING IMMEDIATELY AFTER COMMITTING OR ATTEMPTING TO COMMIT AN AGGRAVATED ROBBERY."

COUNT TWO:

"[T]HE ABOVE NAMED DEFENDANT(S) . . . UNLAWFULLY AND PURPOSELY CAUSED THE DEATH OF ANOTHER, TO-WIT: JOHN ALLEN, WHILE COMMITTING OR ATTEMPTING TO COMMIT OR WHILE FLEEING IMMEDIATELY AFTER COMMITTING OR ATTEMPTING TO COMMIT AN AGGRAVATED BURGLARY."

On each count of aggravated murder, appellant was found not guilty of these two specifications:

"THE GRAND JURORS FURTHER FIND AND SPECIFY THAT THE OFFENSE PRESENTED ABOVE WAS COMMITTED WHILE THE OFFENDER WAS COMMITTING OR ATTEMPTING TO COMMIT OR FLEEING IMMEDIATELY AFTER COMMITTING OR ATTEMPTING TO COMMIT AGGRAVATED ROBBERY AND EITHER THE OFFENDER WAS THE PRINCIPAL OFFENDER IN THE COMMISSION OF THE AGGRAVATED MURDER, OR IF NOT THE PRINCIPAL OFFENDER, COMMITTED THE AGGRAVATED MURDER WITH PRIOR CALCULATION AND DESIGN; AND/OR"

"THE GRAND JURORS FURTHER FIND AND SPECIFY THAT THE OFFENSE PRESENTED ABOVE WAS COMMITTED WHILE THE OFFENDER WAS COMMITTING OR ATTEMPTING TO COMMIT OR FLEEING IMMEDIATELY AFTER COMMITTING OR ATTEMPTING TO COMMIT AGGRAVATED BURGLARY, AND EITHER THE OFFENDER WAS THE PRINCIPAL OFFENDER IN THE COMMISSION OF THE AGGRAVATED MURDER, OR IF NOT THE PRINCIPAL OFFENDER, COMMITTED THE AGGRAVATED MURDER WITH PRIOR CALCULATION AND DESIGN;"

Appellant argues that the verdicts are inconsistent because they seem to say appellant purposefully caused the death of John Allen during the course of an aggravated robbery and an aggravated burglary while at the same time saying he was not guilty of such offenses.

We find the verdicts are not inconsistent. *State v. Brown* (1984), 12 Ohio St. 3d 147. It was held in *State v. Perryman* (1976), 49 Ohio St. 2d, 14, *vacated on other grounds*, 438 U.S. 911, that an inconsistency between a guilty verdict of the principal charge and a not guilty verdict of a specification will not warrant reversal of the guilty verdict. The court stated at syllabus three as follows:

"3. WHERE A JURY CONVICTS A DEFENDANT OF AN AGGRAVATED MURDER COMMITTED IN THE COURSE OF AN AGGRAVATED ROBBERY, AND WHERE THAT DEFENDANT IS CONCURRENTLY ACQUITTED OF A SPECIFICATION INDICTING HIM FOR

IDENTICAL BEHAVIOR, THE GENERAL VERDICT IS NOT INVALID."

Therefore, in this case, the guilty verdicts as to the two counts of aggravated murder are not rendered invalid by the jury's finding on the two specifications.[12]

This assignment of error is overruled.

"V. THE OHIO DEATH PENALTY STATUES ARE UNCONSTITUTIONAL BECAUSE THEY ALLOW A DEFENDANT, SUCH AS THE APPELLANT IN THIS CASE, TO RECEIVE THE DEATH PENALTY FOR ONLY BEING AN ACCOMPLICE, IN VIOLATION OF THE UNITED STATES SUPREME COURT MANDATE IN *ENMUND V. FLORIDA*, 102 St. Ct. 3368 (1982)."

Appellant contends that the Ohio statutes regarding aggravated murder and the death penalty are contrary to the directive set out in *Enmund v. Florida* (1982), 458 U.S. 782. We preface our discussion under this assignment with the comment that the overwhelming evidence indicates that defendant was the principal offender and that he personally shot and killed John Allen. Because the jury found him guilty of aggravated murder, it is unnecessary to establish whether he was the principal offender or an aider and abettor.

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[12] A close reading of the language in the principal charge and the two specifications reveals that there is not necessarily an inconsistency in a guilty verdict of aggravated murder (R.C. 2903.01 (B)) and not guilty of the two specifications involved. An individual can be convicted of aggravated felony murder as an accomplice but not found to have prior calculation and design. Thus, a person would not be guilty of the aggravating specification set out in R.C. 2929.04 (A)(7).

Whether he was the principal only becomes an issue when looking at the penalty enhancing specification. R.C. 2929.04(A)(7).

In *Enmund* the Supreme Court held that the Eighth Amendment, which forbids cruel and unusual punishment, prohibits imposition of the death penalty where a defendant aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill or *intend* that a killing take place or that deadly force be used. 102 S. Ct. at 3376-77. The statute does not violate *Enmund*.

The pertinent portions of R.C. 2903.01, the aggravated murder statute provide as follows:

> "(B) NO PERSON SHALL *PURPOSELY* CAUSE THE DEATH OF ANOTHER WHILE COMMITTING OR ATTEMPTING TO COMMIT, OR WHILE FLEEING IMMEDIATELY AFTER COMMITTING OR ATTEMPTING TO COMMIT KIDNAPPING, RAPE, AGGRAVATED ARSON OR ARSON, AGGRAVATED ROBBERY OR ROBBERY, AGGRAVATED BURGLARY OR BURGLARY, OR ESCAPE."
>
> * * *
>
> "(D) *NO PERSON SHALL BE CONVICTED OF AGGRAVATED MURDER UNLESS HE IS SPECIFICALLY FOUND TO HAVE INTENDED TO CAUSE THE DEATH OF ANOTHER.* IN NO CASE SHALL A JURY IN AN AGGRAVATED MURDER CASE BE INSTRUCTED IN SUCH A MANNER THAT IT MAY BELIEVE THAT A PERSON

COMMITS OR ATTEMPTS TO COMMIT ANY OFFENSE LISTED IN DIVISION (B) OF THIS SECTION TO BE CONCLUSIVELY INFERRED, BECAUSE HE ENGAGED IN A COMMON DESIGN WITH OTHERS TO COMMIT THE OFFENSE BY FORCE AND VIOLENCE OR BECAUSE THE OFFENSE AND THE MANNER OF ITS COMMISSION WOULD BE LIKELY TO PRODUCE DEATH, TO HAVE INTENDED TO CAUSE THE DEATH OF ANY PERSON WHO IS KILLED DURING THE COMMISSION OF, ATTEMPT TO COMMIT, OR FLIGHT FROM THE COMMISSION OF AN ATTEMPT TO COMMIT, THE OFFENSE. IF A JURY IN AN AGGRAVATED MURDER CASE IS INSTRUCTED THAT A PERSON WHO COMMITS OR ATTEMPTS TO COMMIT ANY OFFENSE LISTED IN DIVISION (B) OF THIS SECTION MAY BE INFERRED, BECAUSE HE ENGAGED IN A COMMON DESIGN WITH OTHERS TO COMMIT THE OFFENSE BY FORCE OR VIOLENCE OR BECAUSE THE OFFENSE AND THE MANNER OF ITS COMMISSION WOULD BE LIKELY TO PRODUCE DEATH, TO HAVE INTENDED TO CAUSE THE DEATH OF ANY PERSON WHO IS KILLED DURING THE COMMISSION OF OR ATTEMPT TO COMMIT THE OFFENSE, THE JURY ALSO SHALL BE INSTRUCTED THAT THE INFERENCE IS NON CONCLUSIVE, THAT THE INFERENCE MAY BE CONSIDERED IN DETERMINING INTENT, THAT IT IS TO CONSIDER ALL EVIDENCE INTRODUCED BY THE PROSECUTION TO INDICATE THE

> PERSON'S INTENT AND BY THE PERSON TO INDICATED HIS LACK OF INTENT IN DETERMINING WHETHER THE PERSON SPECIFICALLY INTENDED TO CAUSE THE DEATH OF THE PERSON KILLED, AND THAT THE PROSECUTION MUST PROVE THE SPECIFIC INTENT OF THE PERSON TO HAVE CAUSED THE DEATH BY PROOF BEYOND A REASONABLE DOUBT." (*EMPHASIS ADDED.*)

Hence, an individual is not guilty of aggravated murder in Ohio unless he specifically intended to cause the death of another. Additionally, he cannot be given the death penalty unless he intended to kill *and* was convicted of one of the aggravating circumstances listed in R.C. 2929.04. *Enmund* seeks to prevent the death penalty being imposed in situations where a defendant is a participant in a felony, but he had no intention that a person be killed during the crime. *See generally* R.C. 2903.04(A) (Involuntary manslaughter is a felony when a person dies as the proximate result of the defendant's commission of a felony. No specific intent is required as to the causation of death.)

We, therefore, conclude that the Ohio statutory scheme which provides for the imposition of the death penalty adheres to the requirements established in *Enmund*. By finding appellant guilty of the principal offenses in Counts I and II the jury found that appellant purposefully caused the death of John Allen during the course of an aggravated robbery and aggravated burglary. The verdict demonstrates the jury found defendant to have the requisite mental culpability.

The fifth assignment of error lacks merit.

"VI. THE CUMULATIVE CONDUCT OF THE PROSECUTORS IN SUGGESTING THE APPELLANT MAY BE A HOMOSEXUAL, COMMENTING ON HIS RIGHT NOT TO TESTIFY, AND INTRODUCING INNUENDOS CONCERNING POSSIBLE BAD ACTS, DENIED THE APPELLANT A FAIR TRIAL."

Appellant contends that the prosecutor's comments and questions in three areas, two during voir dire and one during the State's case in chief, constituted such egregious error as to have denied him a fair trial. Since we do not concur in appellant's assessment of the prosecutor's conduct, we overrule the sixth assignment of error.

Appellant first complains about a question asked during voir dire. The prosecutor asked during voir dire: "Now, in the course of the trial evidence may come out that the defendant is a homosexual too, and that wouldn't mean anything to you either, will it?" (T. 573). No evidence was elicited during trial that the defendant was a homosexual.

We do not think this question was relevant to the case. While it had the potential for inflammatory impact on the jury, *see e.g., State v. Tolliver* (March 15, 1984), Cuyahoga App. No. 46277, no prejudice is exemplified here.

Prosecutorial misconduct will only result in reversal error where the misconduct was "so flagrant as to prevent a fair trial." *State v. Carver* (1972), 30 Ohio St. 2d 280. *See e.g., State v. Liberatore* (1982), 69 Ohio St. 2d 583. There was no prejudice as no evidence was introduced which even insinuated that defendant was a homosexual. The conduct of defense counsel also supports our conclusion. When asked by the judge if he wanted a curative instruction given to the jury, he declined.

Appellant also contends that a new trial should be granted on the prosecution's comments during voir dire on whether or not the appellant would take the stand.

During voir dire, the prosecutor stated as follows:

> "Now, again, the defendant may or he may not testify. It is totally up to him. Everybody says they understood that and accepted that."
>
> "If the defendant does not testify, you may use his failure to testify for any purpose. Does everybody understand that? Does everybody accept that completely, that you are not to let that influence your decision in this case whatsoever?"
>
> "Again, I take it from everyone's silence that they would not let his failure to testify – no one would use it against him at all."
>
> "Now, on the other hand, if the defendant chooses to testify, you will judge his credibility as you would anyone else's, would you not?" (T. 603, 604).

The prosecutor again commented as follows:

> "If David Mapes testifies and again, you know, that he doesn't have to testify, but if he doesn't testify, you are not going to hold that against him, are you?" (T. 919).

A prosecuting attorney is barred from commenting upon a defendant's silence at trial because of the guarantee against self-incrimination of the Fifth and Fourteenth Amendments to the United States Constitution. *Griffin v. California* (1965), 380 U.S. 609. Thus, it was improper for the

prosecutor to comment at voir dire on the fact defendant may not testify. Even though the prosecutor did not openly impeach appellant in this manner, he improperly planted the seeds for doubt in the jury's minds by **any** comment on the matter. However, a reviewing court may not automatically reverse a conviction when there has been a *Griffin* error. The harmless error doctrine must be applied. *United States v. Hastings* (1983), ___ U.S. ___, 103 S.Ct. 1974, 1981. The court in *Hastings* stated: "The question a reviewing court must ask is this: absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?" We come to the conclusion the answer is emphatically yes.

A review of the strong evidence against the appellant indicates that the case against him was overwhelming. Furthermore, the trial court properly instructed the jury on the defendant's right not to take the stand. (T. 3672). Therefore, the prosecutor's comments were harmless error.

Finally, appellant argues that the testimony of Michael Reese concerning the two men who approached him at his home and asked about his planned testimony at appellant's trial was error. (See pp. 5 and 6 of the facts). He argues this evidence prejudiced the appellant by its insinuation that he was the person who sent the two men to frighten Reese. Thus, appellant claims the evidence was inadmissible under Evid. R. 404. We disagree.

The evidence was properly admitted. It was not used to show that the appellant sent the two men to intimidate Reese as an admission of the crimes. In fact, no evidence was elicited that the men were in any way connected with Mapes. It explained the chain of events leading to the call made by Mapes from Jail to Reese in which appellant made a number of incriminating statements. Reese stated that after talking to

the two men, he went to see the appellant's wife. He asked her to have the appellant call him. On May 1, 1983 Mapes called Reese and stated with regard to the Chaps incident that, "he wished it could have been another way, he wasn't intending for it to happen that way ...." (T. 2525). Mapes also told Reese at that time that he got about one thousand dollars from the robbery and that about one of the victims, "he wished he hadn't made a certain move or some kind of move that he made." (T. 2526, 2528).

The evidence was also relevant to bolster the credibility of the witness. Reese had a history of convictions for felonies. It was necessary to explain why the witness spoke with appellant just prior to trial since evidence was presented that the two men were only acquaintances.

"VII. THE APPELLANT WAS DENIED TRIAL BY AN IMPARTIAL JURY BECAUSE OF THE TRIAL COURT'S REFUSAL TO VOIR DIRE POTENTIAL JURORS INDIVIDUALLY AND IN SEQUESTRATION."

"A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY 'DEATH QUALIFYING' JURORS IN THE PRESENCE OF ONE ANTOHER," AND

"B. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY VOIR DIRE QUESTIONING OF JURORS IN THE PRESENCE OF ONE ANOTHER."

Appellant contends that it was reversible error to not individually voir dire prospective jurors because the impact of such questions suggests that the appellant is guilty and would result in a biased jury.

Appellant relies on the case of *Hovey v. Superior Court of Alameda Cty.* (1980), 168 Cal. Rptr. 128, 6161 P.2d 1301. The California Supreme Court stated that when a jury is being death qualified, the voir dire should be conducted individually and in sequestration. That court based its conclusion on a number of empirical studies. One study in particular stated that a juror becomes more likely to impose the death penalty where he views his fellow venire persons being death qualified. 616 P.2d at 1353. *See also State v. Timmons* (1983), 192 N.J. Super. 141, 469 A.2d 46.

We agree with the California Supreme Court that such result is possible. Therefore, we would encourage the use of individual voir dire when qualifying jurors involving the death penalty. However, in the case *sub judice* appellant has exemplified no prejudice resulting from the procedure used.

The question of whether a voir dire should be conducted in sequestration is a matter of discretion by the trial judge. *State v. Gall* (1980), 65 Ohio App. 2d 57. Therefore we adhere to the holding of a number of jurisdictions that a motion to sequester jurors during voir dire in capital cases is within the discretion of the trial court and will not be reversed without a showing of abuse of discretion. *Louisiana v. Kirkpatrick* (1983), 443 So.2d 546; *Lexington Herald-Leader Company, Inc. v. Meigs* (Ky. 1983, 660 S.W. 2d 658; *North Carolina v. Adcock Meigs* (1983), 310 N.C. 1, 310 S.E.2d 587. Appellant has demonstrated no abuse of discretion or prejudice in the instant case.

Thus, we overrule this assignment of error.

"VIII. APPELLANT'S CONVICTION IN COUNTS ONE AND TWO UNDER R.C. 2903.01 AND R.C. 2929.04(A)(5) MUST BE REVERSED AS IT CANNOT BE CONCLUDED FROM THE RECORD THAT APPELLANT WAS REPRESENTED BY COUNSEL AT HIS ARRAINGMENT FOR SUCH CHARGES."

Appellant complains that he was not represented by counsel at his arraignment. Appellant entered a plea of not guilty at that time. An objection was put on the record by defense counsel that Mapes was improperly deprived of counsel at a critical stage. This objection was made at the conclusion of the guilt phase of the trial heard by the jury but prior to the hearing on the prior murder specification.

A journal entry dated April 21, 1983 shows that appellant was arraigned on April 15, 1983. At that time appellant was advised of his constitutional rights, including the right to counsel. The trial judge (not the same as the arraignment judge) took judicial notice that appellant was represented by counsel at arraignment even though there was no evidence to that effect. (T. 3871).

Whether or not defendant was represented by counsel at arraignment was not prejudicial. In Ohio arraignment is not a critical stage of prosecution because no defenses are lost. *Brady v. Blair* (S.D. Ohio, 1976), 427 F.Supp. 5.

R.C. 2943.03 provides in pertinent part as follows: "The court may, for good cause shown, allow a change of plea at any time before the commencement of trial." The Ohio Supreme Court has interpreted the language in the statute to mean that where an indigent pleads to an indictment without counsel, subsequent appointment of counsel places him in the same place he stood prior to arraignment. Appointment of counsel constitutes good cause, and a subsequent refusal by a

trial court to permit the change of plea would constitute an abuse of discretion. *Dean v. Maxwell* (1963), 174 Ohio St. 193; *Vitoratos v. Maxwell* (6th Cir. 1965), 351 F.2d 217.

Furthermore, since the appellant made no incriminating statements at arraignment, he was not otherwise prejudiced by the absence of counsel because he entered a plea of not guilty. Moreover, the April 21, 1983 journal entry indicates appellant was read his rights pursuant to Crim. R. 10.

We overrule this assignment of error.

"X. UNDER R.C. 2941.25(A), THE APPELLANT CANNOT BE CONVICTED OF TWO COUNTS OF AGGRAVATED MURDER AND TWO COUNTS OF HAVING A FIREARM WHILE COMMITTING THE AGGRAVATED MURDER COUNTS, WHEN THERE WAS ONLY ONE HOMICIDE COMMITTED WITH ONE GUN, AND THEREFORE, APPELLANT CANNOT RECEIVE TWO DEATH PENALTY SENTENCES OR IN THE ALTERNATIVE, TWO LIFE SENTENCES AND TWO MANDATORY THREE YEAR TERMS."

Appellant argues that the two counts of aggravated murder, both under R.C. 2903.01(B), are allied offenses of similar import. Therefore, he contends that his conviction and punishment on both counts violates R.C. 2941.25. We agree, and one conviction must be set aside.

In the first count appellant was convicted of felony murder while committing an aggravated robbery. The second count was felony murder during an aggravated burglary. Only one homicide actually occurred.

R.C. 2941.25 provides:

> "(A) **Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.**"
>
> "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them." (Emphasis added.)

Ohio courts have consistently held that a person cannot be convicted of more than one count of aggravated murder for a single homicide. *State v. Osborne* (1976), 49 Ohio St. 2d 135; **vacated on other grounds**, 438 U.S. 911; *State v. Spisak* (July 19, 1984), Cuyahoga App. Nos. 47458, 47459; *State v. Morales* (Dec. 16, 1982), Cuyahoga App. Nos. 44145, 44146, 44279, 44280, 45802; *State v. Guy* (Dec. 31, 1980), Cuyahoga App. No. 42225; *State v. Morningstar* (Butler, 1980), 19 Ohio Op. 3d 283.

Clearly the same conduct by Mapes in killing John Allen formed the basis for counts one and two of the indictment. On that basis, we sustain the tenth assignment of error. Appellant's conviction for aggravated murder on the second count of the indictment and the two specifications under that indictment is vacated.

"XI. APPELLANT'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT AND FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR AND IMPARTIAL TRIAL WERE VIOLATED IN THE SENTENCING PHASE WHEN THE PROSECUTOR, OVER OBJECTION, COMMENTED ON THE APPELLANT'S UNSWORN STATEMENT DOING SO IN A MANNER WHICH DIRECTLY REFERRED TO APPELLANT'S FAILURE TO TESTIFY DURING BOTH THE GUILT PHASE AND THE SENTENCING PHASE."

During the penalty phase of the trial, Mapes made an unsworn statement to the jury in which he stated that he was not the triggerman in the 1972 New Jersey murder. He also said that he had no control over the circumstances surrounding that murder. R.C. 2929.03(D)(1) allows a defendant to make an unsworn statement. He is not subject to cross-examination by doing so.

During the prosecutor's final argument, he stated:

> "You are supposed to look at the evidence hard, coldly, and say, is there mitigation, and does the defendant, he had the burden of going forward, he said to you, I chose not to take the oath.
>
> "By his taking the stand like he did, and by him not taking an oath, this is what he is telling you. Number one, I am not going to subject myself to any response whatsoever. From that testimony –
>
> "MR. CARLIN: Objection, your honor.
>
> "THE COURT: Overruled.

"MR. NUGENT: It means nothing.

"He says to you that he chooses not to be the same as you and take the oath that you took and every other witness took. He is the only person that came before you out of over 30 witnesses that didn't take the oath.

"And what should that mean to you? It should show you the kind of person that he is, that he doesn't want someone to question him about, well, if you say that you weren't the trigger man, let's get a little information about that. Let the prosecutor ask you a couple of questions." (t. 4154-4155).

This court previously addressed this issue in *State v. Jenkins* (Feb. 24, 1984), No. 45231, slip opinion at 42-44. At that time we stated that while *Griffin v. California* (1965), 380 U.S. 609, prohibits prosecutorial comment on a defendant's failure to testify, such protection does not extend to an unsworn statement which provides information otherwise not in the evidence. By statute the prosecutor is not allowed to cross-examine the defendant after he has made an unsworn statement. "However, the prosecutor should be allowed to argue that the defendant's statement has less credibility because it is not given under oath." *Jenkins* at 44.

Appellant's eleventh assignment of error is overruled.

"XII. THE COURT ERRED IN ADMITTING INTO EVIDENCE THE ITEMS SEIZED FROM THE APPELLANT'S APARTMENT AT THE TIME OF HIS ARREST."

Shortly before 6 a.m. on February 8, 1983 members of the Cleveland Police Department, including the SWAT unit, broke into appellant's apartment at the Towne House

Apartments. The police had an arrest warrant for David Mapes and a search warrant for his premises. The SWAT unit found appellant on his knees crawling to the bathroom where there was a hole in the screen to the bathroom window.

The police seized screwdrivers, a hammer and a crowbar from the apartment. Appellant sought to suppress these items before trial; however, the trial judge ruled that they were properly admissible.

At the suppression hearing Detective Kunz stated that he had spoken to Michael Reese prior to Mapes' arrest. In that conversation Reese told Kunz that Mapes had approached him about robbing Chaps Bar. Mapes told Reese that he had a pry bar and a shotgun, and that he wanted to break into the coin machines. Furthermore, Mapes said they would enter the Chaps building through a rear window. Kunz also indicated that Reese had worked with the police in another murder investigation.

Kunz also testified that John Clark, the manager of the Towne House Apartments, told him that he had overheard a conversation between appellant and Hayward Chambers in which they were discussing why Mapes had gone into a bar and killed a man.

The affidavit of Detective Kunz upon which the search warrant was issued specifically describes the location of Mapes' apartment. It contains a definite description of the items for which the police were searching:

> "A shotgun and crow-bar used in the homicide, aggravated burglary of Chaps Bar, 1-30-83, 2408 Prospect, money taken from the coin machines in said crime, and any other evidence from said crime."

It also stated that a confidential informant (Reese) was asked to be a participant in the Chaps crime by Mapes. This informant allegedly provided information to Kunz that led to the identification of a perpetrator in another murder case.

The affidavit also mentions a second confidential informant (Clark) who overheard Mapes and Chambers talking about their involvement in the murder at Chaps. The informant also allegedly provided Kunz with information that lead to the identification of the perpetrator in another homicide.

The United States Supreme Court has recently held that "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." *United States v. Leon* (1984), --- U.S. ---, 35 Crim. L. Rep. 3273, 3279 (U.S. July 5, 1984). Therefore, when an officer's conduct is "objectively reasonable", exclusion of evidence serves no deterrent purpose. If an officer relies on a neutral magistrate's probable cause determination, that reliance must be "objectively reasonable." In this case such reliance was clearly proper. The affidavit described with particularity where the search would be conducted, what items were being searched for and the basis for believing the items were in appellant's possession.

We also believe probable cause was established here. Under *Illinois v. Gates* (1983), ---U.S.---, 103 S.Ct. 2317, it was held that probable cause will be said to exist when there is a substantial basis for so concluding. A magistrate may consider the "totality of the circumstances" when making such a determination. See also *Massachusetts v. Upton* (1984), ---U.S.---, 104 S.Ct. 2085

Under the circumstances presented here there was a substantial basis for the issuance of the search warrant. Two reliable informants stated they heard appellant make incriminating statements. The information provided about the use of a shotgun and crowbar and the entrance by way of a back window was consistent with the manner in which the crime was committed.

Thus, the motion to suppress was properly overruled.

The twelfth assignment of error lacks merit.

"IX. THE TRIAL COURT'S SENTENCING OF THE APPELLANT IN THE ALTERNATIVE SHOULD THE DEATH SENTENCE BE MODIFIED BY A HIGHER COURT IS IN VIOLATION OF R.C. 2929.06 AND THEREFORE VOID."

The argument raised under this assignment of error is moot in view of the disposition of appellant's other arguments. Appellant complains it was error for the trial judge to enter an alternative sentence of imprisonment in the event that a higher court vacated the death penalty.

A matter is moot when a judgment is sought upon some matter which cannot have any practical legal effect upon an existing controversy. *Davies v. Columbia Gas & Electric Corp.* (Franklin 1946), 47 Ohio Law Abs. 225, 228. Because we affirm the imposition of the death penalty, any determination about an alternative sentence is rendered moot.

We also must independently weigh the aggravating circumstances against the mitigating factors to determine if the death penalty is appropriate in this case. R.C. 2929.05. We are in agreement with the determination reached by the jury and trial judge that the aggravating circumstance

outweighed any mitigating factors. Moreover, there were no mitigating factors.

The State proved beyond a reasonable doubt that the appellant had been convicted of a previous purposeful killing. R.C. 2929.04(5). Detectives Rafferty and Henion from New Jersey stated that appellant had been indicted and convicted of first degree murder of John Clark in 1972.

Defendant was the only person who testified in his behalf at the penalty phase. He made an unsworn oral statement in which he claimed he was not the triggerman in the New Jersey murder. He also stated that he had offered to plead guilty before this trial in exchange for life imprisonment without parole. Mapes stated this was "to have the jury not go through the trial."

Defense counsel argued in closing argument that the death penalty would not be a deterrent in this case because "something is wrong with him." Counsel advanced the theory that Mapes' genes caused him to commit violent crimes. Counsel was insinuating that the appellant had a deformity as a result, and society should not put those with such problems to death. This argument was totally unsupported by evidence.

We give little significance to appellant's statement that he was not the triggerman in the New Jersey incident. We find that appellant is not a credible witness due to his request to Newton to keep quiet. According to Newton, Mapes told him that because all of the people involved in that previous incident kept quiet, they only were sentenced to a short prison term. Furthermore, Mapes displayed he was not trustworthy by stating to the police he was not involved in the Chaps incident when he was originally arrested. After Newton made a statement and the shotgun shells were discovered, Mapes attempted to explain that the shells were

in the drain because the cat knocked them there. At that point, Mapes admitted for the first time that he had owned a shotgun. Thus, we place no credence in Mapes' statement.

We do not consider Mapes' request for life imprisonment a mitigating factor. There is no provision in Ohio law for life imprisonment without possibility of parole. Furthermore, many, if not most, people when faced with the possible death penalty, would choose a prison sentence. This request in no way excuses appellant's involvement in two murders.

As for counsel's argument that due to some biological quirk appellant was prone to violence, we refuse to consider such a theory which is totally unsupported by any evidence.

After independently reviewing all the evidence, we concur in the trial judge's opinion that the aggravating circumstance, that appellant previously willfully killed John Clark in New Jersey, outweighs any mitigating factors advanced by appellant.

Finally, we have reviewed similar cases to determine if the sentence imposed on Mapes is excessive or disproportionate to the penalty imposed in those other cases. *State v. Martin* (Sept. 27, 1984), Cuyahoga App. No. 47301. *State v. Spisak* (July 19, 1984), Cuyahoga App. Nos. 47458, 47459; *State v. Jenkins* (Feb. 24, 1984), Cuyahoga App. No. 45231; *State v. Shields* (Jan. 26, 1984), Cuyahoga App. No. 46012. We find the sentence imposed here is not excessive or disproportionate.

The trial court's judgment and sentence, as so modified under the tenth assignment of error, is affirmed.

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No. 99-203

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1998

RALPH COYLE, WARDEN,

Petitioner,

vs.

DAVID A. MAPES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SIXTH CIRCUIT COURT OF APPEALS

MOTION TO PROCEED IN FORMA PAUPERIS

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20pp

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, David A. Mapes, through undersigned counsel, respectfully requests leave to file his Brief In Opposition To Certiorari to the Sixth Circuit Court Appeals without prepayment of costs or fees and to proceed *in forma pauperis* pursuant to Rule 39.

Respondent is indigent and has been represented by appointed counsel throughout the federal habeas process.

Respondent Mapes Affidavit in Support of this Motion is attached hereto.

Respectfully submitted,

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No. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1998

DAVID ALLEN MAPES,

Petitioner,

vs.

RALPH COYLE, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SIXTH CIRCUIT COURT OF APPEALS

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED *IN FORMA PAUPERIS*

I swear or affirm under penalty or perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct, (28 U.S.C. §1746; 18 U.S.C. §1621.)

Signed: David A. Mapes

DAVID A. MAPES

Instructions:

Complete all questions in this application and then sign it. Do not leave any blanks: If the answer to a question is "O,"-"none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

Date: May 8. 99

My issues on appeal are:

I. Whether the prohibition against the imposition of death for an aider and abettor without a specific intent to kill as set forth in ***Enmund v.Florida***, 458 U.S. 782 (1982) is violated where the jury returns a general verdict of guilt on a felony-murder count and specific verdicts of not guilty on the death specifications which alleged that the defendant was either the principal offender or an aider and abettor with a specific intent to kill?

II. Whether the proper remedy for a meritorious claim of ineffective assistance of appellate counsel is the issuance of the writ conditioned upon a new state court appeal on the defaulted issues where the only conclusion the state court could arrive at consistent with the Sixth and Fourteenth Amendments is that a constitutional violation occurred warranting the imposition of a life sentence?

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount amount during the past 12 months	Amount expected next month
	You	You
Employment	$ NONE	$ NONE
Self-employment	$ NONE	$ NONE
Income from real property (such as rental income)	$ NONE	$ NONE
Interest and dividends	$ NONE	$ NONE

Gifts	$ NONE	$ NONE
Alimony	$ NONE	$ NONE
Child support	$ NONE	$ NONE
Retirement (such as social security,, pensions, annuities, insurance)	$ NONE	$ NONE
Disability (such as social security, insurance, payments)	$ NONE	$ NONE
Unemployment payments	$ NONE	$ NONE
Public-assistance (such as welfare)	$ NONE	$ NONE
Other (specify):	$ NONE	$ NONE
Total monthly income:	$ NONE	$ NONE

2. List your employment history, most recent employer first. (Gross monthly pay is before or other deductions.)

Employer	Address	Date of employment	Gross monthly Pay
NONE	NONE	NONE	NONE

3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

NONE			

4. How much cash do you and your spouse have? $_____

Below, state any money you and your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
NONE	NONE		NONE

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home	(Value)	Other real estate	(Value)	Motor Vehicle #1	(Value)
NONE				Make & year:	
				Model:	
				Registration #:	

Motor Vehicle #2	(Value)	Other assets	(Value)	Other assets	(Value)
Make & year: NONE					
Model:					
Registration #:					

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
NONE		

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
NONE		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually by show the monthly rate.

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ NONE	$
Are real-estate taxes included?	___ Yes	/ No
Is property insurance included?	___ Yes	/ No
Utilities (electricity, heating fuel, water, sewer, and Telephone)	$	$
Home maintenance (repairs and upkeep)	$ NONE	$
Food	$	$

Clothing	$ None	$
Laundry and dry-cleaning	$ None	$
Medical and dental expenses	$ None	$
Transportation (not including motor vehicle payments)	$ None	$
Recreation, entertainment, newspapers, magazines, etc.	$ None	$
Insurance (not deducted from wages or included in		
Mortgage payment(s)		
Homeowners or renters	$ None	$
Life	$ None	$
Health	$ None	$
Motor Vehicle	$ None	$
Other: None	$	$
Taxes (not deducted from wages or included in Mortgage payments) (specify:		
Installment payments	$ None	$
Motor Vehicle Credit	$ None	$
card (name):	$ None	$
Department	$ None	$
store (name): None		
Other:		
Alimony, maintenance, and support paid to others	$ None	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ None	$
Other (specify):	$ None	$
Total monthly expenses:	$ None	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

___ Yes ___/___ No If yes, describe on an attached sheet.

10. Have you paid — or will you be paying — an attorney any money for services in connection with this case, including the completion of this form? Yes No

If yes, how much? $ None

If yes, state the attorney's name, address and telephone number:

11. Have you paid — or will you be paying — anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

___ Yes ___1___ No

If yes, how much? $_____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal. Death Row

13. State the address of your legal residence.

MANSFIELD CORRECTION FACILITY

Your daytime phone: None

Your age: 45 Your years of schooling 11th

Your social security number: 135-48-3148

No. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1998

RALPH COYLE, WARDEN,

Petitioner,

vs.

DAVID ALLEN MAPES,

Respondent.

BRIEF IN OPPOSITION TO CERTIORARI

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CAPITAL CASE

Whether appellate counsel is required to pursue all non-frivolous claims on direct appeal?

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STATEMENT OF THE CASE

Respondent's trial counsel filed a total of four (4) written motions before trial; a request for a bill of particulars on March 4, 1983, and three (3) suppression motions on April 18, 1983. Trial commenced with voir dire on May 2, 1983. A jury was sworn in on May 9, 1983. The court then conducted hearings on the suppression motions.

Evidence began on May 11, 1983. The jury heard testimony from a total of twenty-six (26) witnesses. On May 24, 1983 the jury was charged and deliberation began. The jury submitted several questions to the court during three (3) full days of deliberations and finally returned a verdict on May 27, 1983. The jury acquitted Respondent of all the aggravating circumstances (*i.e.* death specifications) submitted to them thereby specifically finding that David Mapes was neither the triggerman nor an accomplice with specific intent.

The jury also acquitted Mr. Mapes of the count alleging an aggravated robbery of the decedent. Convictions were returned on the aggravated burglary, two (2) aggravated robbery counts, the two aggravated felony-murder counts, and to the gun specification.

At this point Mapes stood convicted of two aggravated felony-murder counts but acquitted of all aggravating circumstances. Nevertheless, the trial court continued the case for a penalty phase and scheduled a hearing on the remaining aggravating circumstance, the prior New Jersey Homicide.

The trial court convicted Respondent of an aggravating circumstance which had been tried to the bench, and a mitigation hearing was held to allow the jury to determine whether any mitigating factors were present and, if so, whether they outweighed the sole aggravating circumstance. During this hearing defense counsel waived opening statement, presented two (2) unsworn statements by Respondent, and rested.

The State rebutted Respondent's first unsworn statement with testimony from co-defendant Rodney Newton. The first unsworn statement presented by Respondent in mitigation was that he was not the triggerman in either homicide. In rebuttal, Newton testified that prior to trial Mapes had told him that he, David Mapes, was the triggerman in New Jersey, and the police could not do anything to them as long as they kept quiet.

Defense counsel attempted to impeach Newton. Counsel asked Newton whether he was aware that Elliott Hampton was the triggerman in the New Jersey homicide, that there were statements that had been given to the Patterson, New Jersey Police to this effect, and that Hampton was still in prison for this offense. Then prosecutor (now federal district court judge) Don Nugent objected to the cross-examination, arguing that the implication from this line of questioning was false and misleading, and had been fabricated by defense counsel. The trial court granted the prosecutor's objection, struck the questions and answers from the record, and instructed the jury to disregard the entire cross-examination.

Mitigation concluded, closing arguments were made, and the jury was instructed on the same day mitigation began; June 2, 1983. The jury retired to deliberate on the sentence. Jury deliberations continued for two (2) days. The jury returned with several questions, including one on June 3, 1983 inquiring about whether mitigation applied to the aggravating circumstance. Later that evening a deliberating juror, June Chatman, was taken to the hospital.

The jury returned a death verdict on June 4, 1983. The defense requested a jury poll, and June Chatman equivocated about her verdict. The judge accepted the verdict nevertheless and sentenced Respondent to death.

After sentencing Respondent, the trial court appointed two new attorneys to handle the appeal.

STATEMENT OF FACTS

David Mapes and one Rodney Newton were indicted in Cuyahoga County for the crime of aggravated felony-murder as well as aggravated robbery and aggravated burglary. The aggravated murder counts read together with the relevant aggravating circumstances alleged that Mapes was either the principal offender (*i.e.* triggerman) in the death of John Allen, or an aider and abettor who specifically intended to cause John Allen's death. These death specifications as well as non-death firearm specifications were submitted to the jury.

Respondent was also charged with an aggravating circumstance alleging that he committed and was convicted of a prior homicide in New Jersey, an essential element of which involved the purposeful killing of another. This aggravating circumstance was tried to the bench, and it is the only aggravating circumstance for which Respondent was convicted. The jury acquitted Mapes of being either the triggerman or an aider and abettor with specific intent by returning "not guilty" verdicts to all four (4) of the specifications alleging these aggravating circumstances.

Nevertheless, the case proceeded to a penalty phase and the jury was instructed on the presence of the aggravating circumstance upon which the trial court had entered judgment. After a brief mitigation hearing the jury recommended death and the trial court accepted the recommendation.

Different attorneys were appointed to represent David Mapes on appeal. An appeal was filed in the Cuyahoga County (Ohio) Court of Appeals, Eighth Appellate Judicial District raising twelve (12) assignments of error. The Appellate Court modified the sentence by merging the duplicitous aggravated murder counts, but otherwise affirmed the conviction as modified. The case was then briefed and argued in the Ohio Supreme Court which also affirmed the conviction

and sentence. The state court appellate attorneys failed to raise several substantial constitutional claims on direct appeal, including the trial judge's answer to a question returned by the then deliberating penalty phase jury. The trial court's answer to the question instructed the jury that "the mitigating factors do not apply to the prior murder conviction at all."

Present counsel undertook the representation of Respondent once the direct appeal to the Ohio Supreme Court was concluded, and have represented Mr. Mapes in all proceedings, both state and federal, since that date. State post-conviction litigation was concluded without an evidentiary hearing. Federal habeas litigation in district court was also concluded without an evidentiary hearing. The result of the Warden's appeal to the Sixth Circuit is an order remanding the case to the district court with instructions to hold an evidentiary hearing.

The magistrate judge, district court judge and a unanimous panel in the Sixth Circuit all found constitutional error warranting federal habeas relief based upon the trial judge's answer to the deliberating penalty phase jury's question. This issue was litigated in the context of a claim of ineffective assistance of appellate counsel. The Sixth Circuit remanded the case to the district court for an evidentiary hearing. Rehearing *en banc* was denied, and this petition by the Warden ensued.

REASONS FOR DENYING THE WRIT

Under ***Strickland v. Washington*** 466 U.S. 668 (1984) a habeas petitioner claiming ineffective appellate assistance must establish that there was a reasonable probability that he would have succeeded on direct appeal had an omitted issue been briefed and argued.

The Warden's argument for certiorari is that appellate counsel is not constitutionally required to pursue all non-frivolous claims on direct appeal. Petitioner then asserts that a court of appeals should not second guess the reasonable strategy of appellate counsel in this case. According to the Warden, that strategy was to winnow out weaker claims in pursuit of what reasonably appeared to be the most substantive issues.

There are two fundamental flaws in this argument. First, the claims appellate counsel failed to pursue were, *on their face*, not 'weaker claims' but rather, they were obvious and substantial constitutional issues. These are claims that were "clearly stronger than those presented." Pet. App. A-39. Appellate counsel raised twelve issues, all but one of which pertained to the trial phase of the case. As the Ohio Court of Appeals' opinion demonstrates, several of the assignments were almost entirely meritless. Pet. App. A-40. The issues raised in the habeas petition and found to have merit by the Sixth Circuit Court of Appeals were all issues relating to the penalty phase. In fact, the Sixth Circuit opinion raises a serious question about whether state court appellate counsel even read the sentencing transcript. Pet. App. A-40.

The second flaw in the Warden's logic is that there is no reason to believe that appellate counsel "chose" to winnow out any of these issues. Because of this lack of evidence, the Sixth Circuit remanded the case for an evidentiary hearing. At this point, the question of prejudice has already been decided, and it is the law of the case. The only question on remand is the performance prong of ***Strickland***, to wit: was there any rational tactical reason for counsel's failure to raise these issues (including the answer to the jury's question.)

Petitioner argues that, in essence, appellate counsel are constitutionally effective so long as any substantive issues are raised on direct appeal. This argument ignores the fact that the Sixth Circuit Court of Appeals found that several of the issues raised on direct appeal were almost entirely meritless. Neither ***Jones v. Barnes,*** 463 U.S. 745 (1983) nor ***Strickland v. Washington,*** 466 U.S. 668 (1984) suggest that raising some substantive claims, while failing to raise claims that obviously would have prevailed establishes effective appellate counsel.

In order for Respondent to prevail on a claim of ineffective appellate assistance under ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), Respondent was required to show prejudice. In the context of ineffective appellate assistance this means that Respondent was required to establish a reasonable probability of success on direct appeal had the issue been briefed and argued. See, *e.g.*, ***Orazio v. Dugger***, 876 F.2d 1508, 1513-14 (11th Cir. 1989) (failure to raise a meritorious federal constitutional claim established ineffective appellate assistance regardless of how the state courts would have treated the claim). See also, ***Matire v. Wainwright***, 811 F.2d 1430, 1435-36 (11th Cir. 1987); ***Houston v. Lockhart***, 982 F.2d 1246 (8th Cir. 1993). This is what Respondent did and what the Sixth Circuit Court of Appeals held.

Petitioner also suggests that the Sixth Circuit created a new *ad hoc* eleven point ineffective assistance of counsel test. This statement mischaracterizes the opinion. Rather, the opinion merely listed several inquiries that should be considered in determining whether appellate counsel was reasonably competent. Pet. App. A-39. It is also important to note that the Sixth Circuit did not find ineffective appellate counsel. It merely remanded the case to the district court for an evidentiary hearing. Thus, at this point, the Sixth Circuit opinion is not a final order.

Finally, the Warden argues that the issue upon which the district court granted relief was based on a misreading of the record. Petitioner has argued throughout these proceedings that an instruction by the trial court that "[t]he mitigating factors do not apply to the prior murder conviction at all," did not preclude the jury from considering the mitigating factors relating to the prior conviction. That argument simply ignores the plain import of the words. A jury can never be precluded from considering mitigating factors. See ***Lockett v. Ohio***, 438 U.S. 536 (1978).

In ***Lockett***, the Court held that the "Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital cases, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604. The ***Lockett*** court declared unconstitutional an Ohio Statute that prevented a sentencer from considering mitigation.

The decision in ***Lockett*** established a bright line rule; mitigation may not be precluded in a capital case. In ***Eddings v. Oklahoma***, 455 U.S. 104 (1982), the Court concluded that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." *Id.* at 113-14. Similarly, in ***Hitchcock v. Dugger***, 481 U.S. 393, (1987), this Court vacated a death sentence where the trial court's instructions precluded the advisory jury from considering non-statutory mitigating factors. And in ***Skipper v. South Carolina***, 476 U.S. 1 (1986), the trial court excluded testimony concerning rehabilitation of the defendant. That, too, was held to violate the rule established by ***Lockett*** and its progeny.

Obviously, then, the trial judge's instruction to Mr. Mapes deliberating penalty phase jury deprived him of a fair sentencing hearing. This was a valid appellate issue that should have

been, but was not, raised by state court appellate counsel on direct appeal. Their failure to raise this and several other equally significant issues establishes ineffective appellate counsel under ***Strickland v. Washington.*** Indeed, these failures raise a serious question about whether they even read the penalty phase transcript in Respondent's case.

CONCLUSION

The writ should be denied in this case because (a) the Sixth Circuit order remanding the case for an evidentiary hearing is not the type of final order typically accepted by this Court for merit decision, and (b) there is nothing new or particularly significant in the Sixth Circuit's decision because that decision rests upon reasoning well within the compass of ***Lockett v. Ohio***, *supra*.

Respectfully submitted,

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